No. 88-64-CFX
Status: GRANTED

Title: Missouri, et al., Petitioners
v.
Kalima Jenkins, by her friend, Kamau Agyei, et al.

Docketed:
July 9, 1988

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Boicourt,Michael L.

Counsel for respondent: Snyder,Allen R., Ralston,Charles Stephen

Entry	Date	Note	Proceedings and Orders
1	Jul 9 1988	G	Petition for writ of certiorari filed.
2	Jul 9 1988		Appendix of petitioner Missouri, et al. filed.
4	Aug 8 1988		Order extending time to file response to petition until September 9, 1988.
5	Sep 8 1988		Brief of respondent Kansas City, MO School District in opposition filed.
6	Sep 8 1988		Brief of respondents Kalima Jenkins, et al. in opposition filed.
7	Sep 14 1988		DISTRIBUTED. October 7, 1988
8	Oct 11 1988		Petition GRANTED. limited to Questions 1 and 4 presented by the petition.
			**********
9	Nov 17 1988		Record filed.
		*	Certified copy of original record and proceedings, 15 volumes, received. (Box).
10	Nov 23 1988		Joint appendix filed.
11	Nov 23 1988		Brief of petitioners Missouri, et al. filed.
12	Dec 8 1988		Order further extending time to file brief of respondent on the merits until January 11, 1989.
13	Jan 6 1989		SET FOR ARGUMENT TUESDAY, FEBRUARY 21, 1989. (1ST CASE.)
14	Jan 11 1989		Brief of respondent Kalima Jenkins, et al. filed.
15	Jan 11 1989		Brief amicus curiae of National Assn. of Legal Assistants, Inc. filed.
16	Jan 24 1989		CIRCULATED.
17	Feb 10 1989	X	Reply brief of petitioner Missouri, et al. filed.
18	Feb 21 1989		ARGUED.

Supreme Court, U.S.
FILED
JUL 9 - 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-64

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM L. WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
Supreme Court Building
Jefferson City, Missouri 65102
(314) 751-3321
MICHAEL L. BOICOURT
(*Counsel of Record*)
Assistant Attorney General
BRUCE FARMER
Assistant Attorney General
Counsel for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Whether the Eleventh Amendment prohibits an award of attorneys' fees against a State based on current hourly rates which include interest and a delay in payment factor.

2. Whether total liability for attorneys' fees can be assessed against one co-defendant where liability on the merits has been ordered to be shared equally between two defendants.

3. Whether *Hensley v. Eckerhart*, 461 U.S. 424 (1983) requires that the expenses of a prevailing party be reduced in proportion to the reduction in attorneys' fees under 42 U.S.C. § 1988.

4. Whether paralegal and law clerk expenses awarded under 42 U.S.C. § 1988 must be assessed at actual costs rather than market rates.

5. Whether the court below erred in awarding fees for unsuccessful claims against prevailing defendants and then failing to reduce the fee award, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to reflect plaintiffs' partial success as compared to the scope of the litigation as a whole.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellants/cross-appellees
(now petitioners):

The State of Missouri

The Honorable John Ashcroft, Governor of the State of Missouri

The Honorable Wendell Bailey, Treasurer of the State of Missouri

Dr. Robert E. Bartman, The Commissioner of Education of the State of Missouri

The Missouri State Board of Education: Roseann Bentley, Dan L. Blackwell, Terry A. Bond, Thomas R. Davis, Susan D. Finke, Raymond F. McAllister, Jr., Cynthia B. Thompson and Roger L. Tolliver

Appellees/cross appellants
(now respondents):

Kalima Jenkins, by her next friend, Kamau Agyei

Carolyn Dawson, by her next friend, Richard Dawson

Tufanza A. Byrd, by her next friend, Teresa Byrd

Derek A. Dydell, by his next friend, Maurice Dydell

Terrance Cason, by his next friend, Antonia Cason

Jonathan Wiggins, by his next friend, Rosemary Jacobs Love

Kirk Allan Ward, by his next friend, Mary Ward

Robert M. Hall, by his next friend, Denise Hall

Dwayne A. Turrentine, by his next friend, Shelia Turrentine

Gregory A. Pugh, by his next friend, Barbara Pugh

Cynthia Winters, by her next friend, David Winters, on behalf of themselves and all others similarly situated

Appellants/cross-appellees below
(now respondents):

The School District of Kansas City, Missouri, and Claude Perkins, then-superintendent

TABLE OF CONTENTS

QUESTIONS PRESENTED I
PARTIES TO THE PROCEEDING II
TABLE OF AUTHORITIES VI
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 4

A. The Holding of the Eighth Circuit That Attorneys' Fees Under 42 U.S.C. § 1988 Can Be Awarded Against a State at Current Rather Than Historic Rates Despite the State's Eleventh Amendment Immunity From Pre-Judgment Interest Is Contrary to a Previous Decision of This Court and Is in Conflict With a Decision of the First Circuit 4

B. The Eighth Circuit's Refusal to Require the Kansas City, Missouri School District, a Co-Constitutional Violator, to Pay a Proportion of Attorneys' Fees Commensurate With Its Liability on the Merits Is Contrary to a Previous Decision of This Court 7

C. The Court Below Failed to Apply Previous Decisions of This Court by Failing to Reduce Expenses Incurred by the Plaintiffs in the Same Proportion As the Attorneys' Fees Were Reduced 8

D. The Opinion of the Eighth Circuit That Law Clerks and Paralegal Fees Should Be Awarded at Market Rates Rather Than Actual Costs Even Though the Law Clerks and Paralegals Were Hired Exclusively for the Litigation in Question Is in Conflict With a Decision of the First Circuit 9

E. The Eighth Circuit's Refusal to Reduce the Fees and Expenses Awarded to Plaintiffs Is Contrary to a Previous Decision of This Court .. 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Association for Retarded Citizens of North Dakota v. Olson, 561 F.Supp. 495 (D.N.Dak. 1982) 11
Blanchard v. Bergeron, 831 F.2d 563 (5th Cir. 1987), *review granted*, No. 87-1485, 56 U.S.L.W. 3873 (6/28/88) 11
Chapman v. Pacific Telephone and Telegraph Co., 456 F.Supp. 77 (N.D.Calif. 1978) 11
Daly v. Hill, 790 F.2d 1071 (4th Cir. 1986) 4
Edelman v. Jordan, 415 U.S. 651 (1974) 7
Gaines v. Dougherty County Board of Education, 775 F.2d 1565 (11th Cir. 1985) 4
Greenspan v. Automobile Club of Michigan, 536 F. Supp. 411 (E.D.Mich. 1982) 11
Grendel's Den, Inc. v. Larkin, 582 F.Supp. 1220 (D. Mass. 1984), *modified on other grounds*, 749 F.2d 945 (1st Cir. 1984) 11
Hensley v. Eckerhart, 461 U.S. 424 (1983) 8, 9, 13
Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986) 2, 7, 12
Jenkins v. Missouri, 838 F.2d 260 (8th Cir. 1988) 5, 7
Jordan v. Multnomah County, 815 F.2d 1258 (9th Cir. 1987) 4
Kentucky v. Graham, 473 U.S. 159 (1985) 7, 8
Lamphere v. Brown University, 610 F.2d 46 (1st Cir. 1979) 10, 11
Library of Congress v. Shaw, 106 S.Ct. 2957 (1986) 4, 5, 6, 7
Lightfoot v. Walker, 826 F.2d 516 (7th Cir. 1987) 4
Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) 10

Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) 4, 11
Roe v. City of Chicago, 586 F.Supp. 513 (N.D.Ill. 1984) 11
Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987) 4, 5, 6
Ross v. Saltmarsh, 521 F.Supp. 753 (S.D.N.Y. 1981), *aff'd*, 688 F.2d 816 (2nd Cir. 1982) 11
Stewart v. Rhodes, 656 F.2d 1216 (6th Cir. 1981) 10
Vaughns v. Board of Education of Prince Georges County, 598 F.Supp. 1262 (D.Md. 1984), *aff'd*, 770 F.2d 1246 (4th Cir. 1985) 9
Zeffiro v. First Pennsylvania Bank, 574 F.Supp. 443 (E.D.Pa. 1983) 11

Constitutional Provision:

United States Constitution, Eleventh Amendment 1, 4, 5, 6, 7

Statute:

42 U.S.C. § 1988 .....*passim*

OPINIONS BELOW

The opinion of the court of appeals is reported at 838 F.2d 260. The opinion is reprinted as Appendix B in the separate appendix to this petition. The opinions of the District Court are unreported but are reprinted as Appendices C and D of the separate appendix.

JURISDICTION

The State of Missouri, and certain of its agencies and officials, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 and § 1343(3) and (4).

The opinion of the court of appeals was entered on January 29, 1988. Rehearing en banc was denied on April 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The relevant Constitutional provision involved in this case is the Eleventh Amendment which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

STATEMENT OF THE CASE

This petition arises from a decision of the Eighth Circuit Court of Appeals affirming in all respects an order of the District Court for the Western District of Missouri. This order granted almost completely a motion by plaintiff class for attorneys' fees and costs under 42 U.S.C. § 1988. The litigation arose out of a desegregation suit brought by the plaintiff class in 1977. This litigation went on over a period of several years, and is currently in the remedial stage. After the Eighth Circuit rendered its en banc opinion in this cause on December 5, 1986, *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), plaintiffs, among others, filed motions for attorneys' fees and expenses under 42 U.S.C. § 1988. The district court granted compensation for all but 3.5 hours requested by the attorneys for the plaintiff class. The plaintiff class has been represented by the law firm of Benson & McKay from 1979 to the present and concurrently by the NAACP Legal Defense Fund since 1982. In its affirmance of the District Court's order of May 11, 1987, the Court of Appeals required the plaintiffs to be compensated at current rather than historical rates for the services of their counsel. The rates were based in part on a prejudgment interest factor and a delay in payment factor.

Both the District Court and the Court of Appeals imposed liability for the attorneys' fees solely on the State of Missouri rather than splitting them with the State's co-defendant, the Kansas City, Missouri School District. Liability for fees was placed solely upon the State despite the fact that the Kansas City, Missouri School District was ordered to pay 50% of the costs of

remedying the past constitutional violation which gave rise to the lawsuit in the first place.

Plaintiffs were also compensated under 42 U.S.C. § 1988 for the services of law clerks and paralegals hired specifically to work on this case at what the court below found to be market rates, rather than at actual costs.

Further, neither the District Court or the Court of Appeals reduced plaintiffs' expenses. Plaintiffs had made reductions in their attorneys' fees requests totalling approximately 15% (which both the District Court and Court of Appeals found sufficient) but did not reduce their overall expenses by the same percentage (or indeed, any percentage).

Finally, despite plaintiffs' failure to prevail on most of the issues involved in the litigation, the District Court and the Court of Appeals refused to reduce plaintiffs' fee requests beyond plaintiffs' minimal voluntary reductions.

Petitioners request this Court to review all of the decisions on these issues.

The District Court's order was issued on May 11, 1987 (and amended on July 14, 1987). The opinion of the Eighth Circuit was issued on January 29, 1988. The State filed a timely petition for rehearing en banc, which was denied by the Eighth Circuit on April 13, 1988.

REASONS FOR GRANTING THE WRIT

A. The Holding of the Eighth Circuit That Attorneys' Fees Under 42 U.S.C. § 1988 Can Be Awarded Against a State at Current Rather Than Historic Rates Without Regard to a State's Eleventh Amendment Immunity From Pre-Judgment Interest Is Contrary to a Previous Decision of This Court and Is in Conflict With a Decision of the First Circuit.

By allowing an award of attorneys' fees under 42 U.S.C. § 1988 against a state at current rather than historic rates, the Eighth Circuit reached a result inconsistent with this Court's holding in *Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986) and in conflict with the First Circuit's holding in *Rogers v. Okin*, 821 F.2d 22 (1st Cir. 1987).[1]

Petitioners respectfully submit that this Court's holding in *Shaw* raises a serious question as to the correctness of the Eighth Circuit's holding. In *Shaw* the district court increased the adjusted lodestar in an attorneys' fees calculation by 30% to compensate counsel for delay in payment. *Id.*, 106 S.Ct. at 2960. This Court held that

1. The cases cited by the Court below from outside the First and Eighth Circuits to support compensation for delay in payment are inapposite, either because a state was not involved, or the Eleventh Amendment issue was not raised. See *Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986) (county involved, not State); *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565 (11th Cir. 1985) (State not involved); *Jordan v. Multnomah County*, 815 F.2d 1258 (9th Cir. 1987) (State not involved); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (State involved; no discussion of Eleventh Amendment); *Lightfoot v. Walker*, 826 F.2d 516 (7th Cir. 1987) (State involved; no discussion of Eleventh Amendment issue).

the no-interest rule, an element of sovereign immunity, prohibited the award of compensation for delay:

> Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds even when characterized as compensation for delay.

Id., 106 S.Ct. at 2965 (quoted in *Rogers*, 821 F.2d at 26).

Similarly, states have a traditional Eleventh Amendment immunity from prejudgment interest because it is prohibited retroactive relief. Since interest and a delay factor share an identical function under *Shaw*, there is every reason the *Shaw* rationale should apply in the Eleventh Amendment context.

The First Circuit recognized the preceding principle in reaching a result directly contrary to that reached by the Eighth Circuit in the opinion from which review is sought.[2] The First Circuit in *Rogers* held that *Shaw* was applicable in the Eleventh Amendment setting, so that any attorneys' fees award under 42 U.S.C. § 1988 assessed against a State had to be made at historic rather than current rates. *Rogers*, 821 F.2d at 28. The First Circuit noted:

2. The Eighth Circuit noted the conflict:

> We cannot agree with the *Rogers* court that the holding in *Shaw* is applicable in a case involving Eleventh Amendment, rather than federal sovereign immunity . . . *Rogers* assumes that compensation for delay equates with prejudgment interest, and we are not satisfied that it does. *Jenkins*, 838 F.2d at 265.

> Congress has not yet made any statement suggesting that a § 1988 attorney's fees award should include prejudgment interest. Indeed, as recently as 1986 the Court in *Library of Congress* [*v. Shaw*] reiterated that "Prejudgment interest . . . is considered as damages, not a component of 'costs' . . . A Statute allowing costs, and within that category, attorney's fees, does not provide a clear affirmative intent of Congress to waive the sovereign's immunity." 106 S.Ct. at 2965.

Rogers, 821 F.2d at 27.

The legislative history of 42 U.S.C. § 1988 is also silent on the subject of prejudgment interest. See *Rogers*, 821 F.2d at 27. The legislative history of the fee shifting statute does however, make reference to the possibility of an award of counsel fees *pendente lite* in certain circumstances. See 1976 Code Cong. & Ad. News 5908, 5912. Petitioners submit, in accordance with the view of the First Circuit that "[t]his specific mention of the possibility of interim fee awards to cushion the burden on plaintiffs seems to us to cut against any implication that the alternative approach of prejudgment interest was contemplated." *Rogers*, 821 F.2d at 27.

The First Circuit concluded its analysis of the Eleventh Amendment issues by stating:

> Yet where, as here, neither the statutory language nor the legislative history gives any basis for an inference that Congress actually intended to remove the State's Eleventh Amendment immunity from substantial sums of prejudgment interest on attorneys' fees awards - or indeed that Congress even considered the question of prejudgment interest on such awards - we think there is enough vitality in the Amendment to resist the inference.

In conclusion, the Eighth Circuit has interpreted this Court's holding in *Library of Congress v. Shaw* in, we submit, an incorrect way, and in a manner completely inconsistent with the First Circuit's interpretation of this decision in *Shaw*.[3] Petitioners respectfully request the Court to grant a writ of certiorari and resolve this conflict between the circuits.

B. The Eighth Circuit's Refusal to Require the Kansas City, Missouri School District, a Co-Constitutional Violator, to Pay a Proportion of Attorneys' Fees Commensurate With Its Liability on the Merits Is Contrary to a Previous Decision of This Court.

In *Kentucky v. Graham*, this Court indicated that "liability on the merits and responsibility for the fees go hand in hand." 473 U.S. 159, 165. The Court stated that the "logical place to look for relief is to the losing party—the party legally responsible for relief on the merits." *Id.* at 164.

In this litigation the Court of Appeals required the Kansas City, Missouri School District to pay 50% of the costs of remedying the constitutional violation underlying this litigation. See 838 F.2d at 267, Pet.App. at 19; *see also Jenkins*, 807 F.2d at 684-86. Notwithstanding the pronouncements of substantive law regarding apportionment contained in *Kentucky v. Graham, supra*, both the District Court and the Court of Appeals completely absolved KCMSD from liability for any part of the attorneys' fees

---

3. The Eighth Circuit's alternative rationale, permitting compensation for delay to be considered as a factor in adjusting the reasonable hourly rate or the lodestar is also impermissible. That would be the type of end-run around the Eleventh Amendment which this Court rejected in *Edelman v. Jordan*, 415 U.S. 651 (1974).

and expenses, apparently because KCMSD cooperated with the plaintiffs. Petitioners respectfully submit this was error.

The logical extension of *Kentucky v. Graham*, is that liability on the merits and liability for attorneys' fees must be reasonably commensurate. It would be one thing if one of the co-constitutional violators was simply unable to pay its share of the attorneys' fees under 42 U.S.C. § 1988. But no evidence was produced below that would suggest KCMSD was unable to pay its share of attorneys' fees, particularly in light of the fact that the District Court judicially imposed a property tax increase and a Missouri State Income Tax surcharge on the residents of the District in order for the District to pay its share of remedying the constitutional violation.

While exact apportionment may not be mandated, to completely absolve one liable co-defendant of any liability for fees is inconsistent with this Court's holding in *Kentucky v. Graham*. Any discretion a district court may have in this area is limited by *Kentucky v. Graham*.

C. The Court Below Failed to Apply Previous Decisions of This Court by Failing to Reduce Expenses Incurred by the Plaintiffs in the Same Proportion As the Attorneys' Fees Were Reduced.

Plaintiffs sought all of their costs and expenses incurred throughout this litigation, even those spent against the prevailing defendants. The District Court granted them every item of expenses requested, to the penny, and the Court of Appeals affirmed. Petitioners respectfully submit that the failure to make the reductions required by *Hensley v. Eckerhart*, 461 U.S. 424 (1983), was error.

Hensley mandates that hours spent on unsuccessful claims in civil rights litigation must be excluded when making an attorneys' fees award. It follows necessarily that expenses incurred on unsuccessful claims must also be excluded when parties seek to shift the liability for those expenses to other parties. The court in *Vaughns v. Board of Education of Prince Georges County*, 598 F.Supp. 1262 (D.Md. 1984), *aff'd*, 770 F.2d 1246 (4th Cir. 1985) did precisely that. Otherwise the principles expressed in *Hensley* would be frustrated, and losing plaintiffs would be encouraged to play fast and loose with their expense monies, because they would know that all of these would be reimbursed even if they failed to prevail on some issues, and *Hensley* reductions were made on the fees.

Petitioners request this Court to review the judgment of the Court of Appeals in this regard.

D. The Opinion of the Eighth Circuit That Law Clerks and Paralegal Fees Should Be Awarded at Market Rates Rather Than Actual Costs Even Though the Law Clerks and Paralegals Were Hired Exclusively for the Litigation in Question Is in Conflict With a Decision of the First Circuit.

In the order from which review is sought, the Eighth Circuit stated, without adopting an ironclad rule, that it believed that market rates should govern in awarding law clerks and paralegal fees under 42 U.S.C. § 1988. Pet.App. at 15-16.[4]

---

4. An award of $40 per hour for paralegal fees could not be justified unless they were to be awarded at market rates. The evidence developed below did not show that paralegals were paid anywhere near $40 an hour, which would be the equivalent of a yearly salary of $83,200 assuming a 40 hour work week. In fact the evidence below showed paralegals were paid approximately $8 per hour.

The evidence established through the pleadings and the hearing on the attorneys' fees issue showed that most of the law clerks and paralegals employed by the plaintiffs were hired specifically for the litigation at issue. No claim was made that the paralegals did work traditionally done by attorneys. The State argued below that these law clerks and paralegals should be compensated in the same way as expenses are, i.e., at out-of-pocket rates. After all, 42 U.S.C. § 1988 only authorizes the shifting of attorneys' fees to a losing party (along with the built-in profit in that fee), not market rates for law clerks and paralegals, along with another built-in profit factor.

The Eighth Circuit's decision on this issue is directly contrary to the decision of the First Circuit in *Lamphere v. Brown University*, 610 F.2d 46, 48 (1st Cir. 1979). In *Lamphere* the First Circuit held that when paralegals were hired specifically for the purposes of a certain litigation their salaries were recoverable at the rate of the *actual cost* to the employer, not as a separate billing. It is also contrary to the Sixth Circuit's reimbursing only paralegal *expenses* in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979) (court grouped photocopying, paralegal expenses, and travel and telephone costs together as items recoverable as reasonable *out-of-pocket* expenses).[5]

Petitioners submit that the views of the First and Sixth Circuits are more consistent with the statutory purpose of § 1988. The statute was intended to shift

5. In *Stewart v. Rhodes*, 656 F.2d 1216 (6th Cir. 1981), the Sixth Circuit upheld, without significant discussion under an abuse of discretion standard, an award of seemingly market-type rates for paralegal services.

attorneys' fees, with the built-in profit margin in the hourly rate to the losing party in certain civil rights litigation. Certainly shifting other out-of-pocket expenses such as photocopying, telephone costs and law clerk and paralegal expenses to the losing party is not inconsistent with the provision of attorney services. But § 1988 simply does not authorize the shifting of market rates for law clerks and paralegals (which can be as high as $50 or $60 per hour) to the losing party. If market rates for law clerks and paralegals are to be shifted, that determination is for Congress and not the courts to make.

We further note this Court recently granted review in a case raising a very similar issue. See *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir. 1987), *review granted*, No. 87-1485, 56 U.S.L.W. 3873 (6/28/88).

Petitioners respectfully submit that the conflict between federal circuit courts of appeal on this issue warrants resolution by this Court.[6]

6. In addition, the State notes the confusion between lower courts on this issue. Some courts consider paralegal services a part of normal office overhead and completely deny separate reimbursement. *See, e.g., Grendel's Den, Inc. v. Larkin*, 582 F.Supp. 1220, 1229 (D.Mass. 1984), *modified on other grounds*, 749 F.2d 945 (1st Cir. 1984); *Roe v. City of Chicago*, 586 F.Supp. 513, 516 (N.D.Ill. 1984); *Association for Retarded Citizens of North Dakota v. Olson*, 561 F.Supp. 495, 502 (D.N.Dak. 1982). Other courts reimburse the actual costs of such services like *Lamphere, supra*, subject, of course to the *Hensley* reduction for partial success. See, e.g., *Greenspan v. Automobile Club of Michigan*, 536 F.Supp. 411, 415 (E.D.Mich. 1982) (to pay fair market value for paralegal services goes far beyond an award of costs); *Chapman v. Pacific Telephone and Telegraph Co.*, 456 F.Supp. 77, 82-83 (N.D.Calif. 1978) (reimbursement limited to actual or reimbursable cost of paralegal services); *Ross v. Saltmarsh*, 521 F.Supp. 753 (S.D.N.Y. 1981), *aff'd*, 688 F.2d 816 (2nd Cir. 1982) (district court limited reimbursement to actual wages for paraprofessional assistance). Other courts have reimbursed at market rates. *See, e.g., Ramos v. Lamm*, 713 F.2d 546, 558-89 (10th Cir. 1983); *Zeffiro v. First Pennsylvania Bank*, 574 F.Supp. 443, 449 (E.D.Pa. 1983).

E. The Eighth Circuit's Refusal to Reduce the Fees and Expenses Awarded to Plaintiffs Is Contrary to a Previous Decision of This Court.

This case began in 1977, filed originally by the KCMSD and four children of school board members. The original defendants included State of Missouri defendants, State of Kansas defendants, suburban Kansas School Districts, suburban Missouri School Districts (SSD), and three federal agencies. In 1978, the Kansas defendants were dismissed and KCMSD realigned as a defendant. In May, 1979, an Amended Complaint was filed against KCMSD, the federal defendants, the State of Missouri defendants and 12 suburban school districts.

The Court of Appeals' decision on the liability issues emphasized that the amended complaint made "two distinct allegations". 807 F.2d at 661. Plaintiffs asserted an *inter*district violation committed by the SSD's, the State and Federal defendants. Plaintiffs also asserted an *intra*district violation within KCMSD, committed by KCMSD and the State defendants. *Id.*

After 64 trial days presenting the plaintiffs' case, the District Court dismissed the SSD's and further found that none of the alleged discriminatory actions committed by the State or the Federal defendants had caused any significant current interdistrict effects. The District Court thus found in favor of all the defendants on plaintiffs' interdistrict liability claims.

After hearing additional evidence, the Court found in favor of the remaining Federal defendant, but held the State and KCMSD liable for racial segregation of students within KCMSD. The Court of Appeals' en banc decision affirmed the District Court's decision denying inter-

district relief with certain modifications to the intradistrict remedy and also ordered that KCMSD and the State share equal liability for the cost of the remedy. Plaintiffs' Petition for Certiorari from the Court of Appeals' en banc decision, No. 86-1717, filed April 24, 1987, strongly reveals that the primary focus of this litigation was *inter*district relief. The very first line of the Statement of Facts is "[t]his is an interdistrict school desegregation case." Plaintiffs' Petition for Certiorari, No. 86-1717, p. 3.

Yet, out of a total of approximately 45,000 hours work, plaintiffs only excluded about 7,300 hours claiming this was services expended on unsuccessful claims against the prevailing defendants and that the remaining time was spent on their successful claims or was so closely interrelated with their successful claims that it could not be separated.

The Court of Appeals was clearly troubled by the District Court's acceptance of the plaintiffs' voluntary reductions. The Court noted that they "might not have arrived at the same result as the District Court." The panel nevertheless affirmed the District Court order as not an abuse of discretion. The petitioners seek certiorari on this issue in order to clarify the continuing validity of *Hensley v. Eckerhart*, 461 U.S. 424 (1983) as it relates to percentage reductions for partial success.

The minimal reductions in this case are clearly insufficient and an obvious abuse of discretion when one compares plaintiffs' limited success with the scope of the litigation as a whole. The goal of the plaintiffs was mandatory interdistrict relief, and this goal was simply not achieved.

While the State acknowledges that district courts must have some discretion in this matter, reimbursement of 85% of the hours worked in this case is clearly an abuse of discretion. It is evident that appellate courts need additional guidance from this Court concerning the proper review of attorney fee awards. The Appellate Court's decision not to modify the District Court's percentage reduction despite its disagreement is inconsistent with this Court's frequent admonishment that attorneys' fees issues should not result in a second major litigation. If satisfactory review, based on clearly established principles, cannot be obtained in an appellate court, then the parties are left with no choice but to turn fee applications into major litigation before the District Court.

CONCLUSION

For the reasons given, petitioners respectfully request this Court to grant a writ of certiorari.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
Supreme Court Building
Jefferson City, Missouri 65102
(314) 751-3321
MICHAEL L. BOICOURT
(*Counsel of Record*)
Assistant Attorney General
BRUCE FARMER
Assistant Attorney General
Counsel for Petitioners

88-64

No.

Supreme Court, U.S.
FILED
JUL 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM L. WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
Supreme Court Building
Jefferson City, Missouri 65102
(314) 751-3321
MICHAEL L. BOICOURT
(*Counsel of Record*)
Assistant Attorney General
BRUCE FARMER
Assistant Attorney General
Counsel for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

331

TABLE OF CONTENTS OF APPENDIX

Appendix A - Order of the Court of Appeals for the Eighth Circuit, April 13, 1988 ..... A1

Appendix B - Order of the Court of Appeals for the Eighth Circuit, January 29, 1988 ..... A2

Appendix C - Order of the District Court for the Western District of Missouri, May 11, 1987 .....A22

Appendix D - Order of the District Court for the Western District of Missouri, July 14, 1987 .....A44

Appendix E - Order of the Court of Appeals for the Eighth Circuit, December 5, 1986 .....A50

Appendix F - Order of the District Court for the Western District of Missouri, September 17, 1984 ....A171

Appendix G - Order of the District Court for the Western District of Missouri, June 5, 1984 .....A216

APPENDIX A

ORDER OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, APRIL 13, 1988

(Filed April 13, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2076-WM

Kalima Jenkins, etc.,
Appellee,

vs.

The State of Missouri, et al.,
Appellants.

Appeal from the United States District Court
for the Western District of Missouri

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

April 13, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX B

ORDER OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, JANUARY 29, 1988

(Filed January 29, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2075

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

and

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education

Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President

Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,

Members of the Missouri State Board of Education,

Arthur L. Mallory, Commissioner of Education of the State of Missouri,

Appellees,

and

School District of Kansas City, Missouri,

Appellant,

and Claude C. Perkins, Superintendent thereof.

No. 87-2076

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education

Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
Members of the Missouri State Board of Education,

Arthur L. Mallory, Commissioner of Education of the State of Missouri,

Appellants,

and

School District of Kansas City, Missouri,
and Claude C. Perkins, Superintendent thereof,

Appellee.

No. 87-2077

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next

friend, David Winters, on behalf of themselves and all others similarly situated;

Appellants,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education

Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
Members of the Missouri State Board of Education,

Arthur L. Mallory, Commissioner of Education of the State of Missouri,

Appellees,

and

School District of Kansas City, Missouri,
and Claude C. Perkins, Superintendent thereof.

Appeals from the United States District Court for the Western District of Missouri.

Submitted: October 13, 1987
Filed: January 29, 1988

Before LAY, Chief Judge, HEANEY and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The award of attorneys' fees in the Kansas City, Missouri school desegregation case has resulted in this trio of appeals. The district court[1] awarded plaintiffs' co-counsel, Arthur Benson, and the Legal Defense Fund of the NAACP (LDF) fees and expenses for services rendered in the litigation, imposed solely against the State of Missouri. The district court denied the application of the Kansas City, Missouri School District (KCMSD) for attorneys' fees. On appeal the State of Missouri argues that the district court award compensated plaintiffs' counsel for time spent on unsuccessful claims and the fee should have been reduced because of plaintiffs' partial success; that there was error in awarding an hourly rate based upon a delay in payment factor because this is an award of interest against the State prohibited by the eleventh amendment; that 50 percent of the fee should have been imposed on KCMSD; and that the fees and expenses were unreasonable. KCMSD argues that as a party seeking to enforce the civil rights laws through litigation and as a prevailing party, it was eligible for an award of attorneys' fees. Plaintiffs argue that the district court erred in not enhancing their fee to compensate for the risk plaintiffs' counsel assumed. The judgment of the district court is affirmed.

The school desegregation case was filed in 1977 and the history of this litigation is outlined with a broad brush in this court en banc's opinion. *Jenkins v. State of Missouri*, 807 F.2d 657, 661-62 (8th Cir. 1986) (en banc), *cert. denied*, 108 S. Ct. 70 (1987). Plaintiffs submitted a detailed application for fees under 42 U.S.C. § 1988 (1982).[2] The State filed a response cataloging specific items in the fee applications it deemed excessive, and the plaintiffs responded with an item-by-item rebuttal of the State's objections. Evidence was presented at a hearing.

1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

The district court recognized that plaintiffs are entitled to attorneys' fees if they succeeded on any significant issue in the litigation. It found the plaintiffs were undisputedly prevailing parties.

The district court based its fee calculation on the number of hours and amount of expenses the plaintiffs submitted. The plaintiffs had cut their total hours to delete time spent on unsuccessful interdistrict claims against federal, Kansas and suburban school district defendants. The court adopted the plaintiffs' adjusted request as the basis for the number of reasonable hours, rejecting the State's arguments for further cuts because it found that the remaining hours were either expended solely on the successful claims or were "so closely interrelated" with them "that they cannot be separated or reduced by some arbitrary percentage." *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip. op. at 3 (W.D. Mo. May 11, 1987).

The district court concluded that the hours submitted by the plaintiffs after their suggested reductions for time spent on unsuccessful claims represented the time reason-

---

2. 42 U.S.C. § 1988 (1982) provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

ably spent on this litigation, except for 3.5 of the hours requested for LDF attorney Liebman. The court also determined that the hours and expenses submitted by LDF and Benson for litigating fee requests were reasonable and allowed the expenses and a fee based on the hours submitted.

The court then turned to the determination of an hourly rate. It found that Benson's rate would fall at the higher end of a range of $125 to $175 per hour. In doing so it considered the attorney's customary fee, his experience, reputation and ability. In addition, because the application was for services rendered from March, 1979 through June, 1986, the court deemed it essential that the hourly rate include compensation for the delay in payment. In light of delay, preclusion from other employment and the undesirability of the case, the court determined that an hourly rate of $200 per hour was reasonable.

The court determined the applicable rate for LDF's fees to be that of the locality of the litigation, Kansas City, rather than New York. It determined that a fee was appropriate for the representation by non-profit counsel and considering compensation for delay in payment awarded LDF fees at the current rather than historical rates.

The court rejected plaintiffs' claims for enhancement of the fee for quality of representation and risk of non-payment, finding that the quality of representation was included in the determination of the hourly rate. It rejected the argument that there should be upward adjustment for risk of loss because it found the plaintiffs' likelihood of success in their claim against the State was very high, the risk of non-payment slight, and the small risk of non-payment was fully reflected in the reasonable attorneys' fee calculated by the court.

The district court awarded Benson and his staff a total of $1,687,139.92 for fees and expenses rendered from March 1979 to June 30, 1986, and for the fees and expenses incurred in litigating the fee application. As Benson had received $347,332.93 of this amount, the balance due was stated to be $1,339,806.99. The court awarded LDF a total of $2,323,730.60 for fees and expenses through May 31, 1985, and $42,145.14 for litigation of the fees and expenses issue.

The court amended its order on July 14, 1987 to include an additional $37,950.00 fee award to Benson for monitoring the remedial plan in 1985-86, based on an hourly rate of $125 per hour for Benson, and $3,478.00 in expenses so incurred.

In ruling on KCMSD's fee application, the court noted that it had found in favor of KCMSD on its cross-claim against the State of Missouri, but that the cross-claim simply reiterated plaintiffs' allegations and that the same remedial plans would have been ordered even if KCMSD had not reiterated plaintiffs' allegations in its cross-claim. The district court also observed that KCMSD was adjudged liable and ordered to pay 50 percent of the costs of the remedy. *See Jenkins*, 807 F.2d at 684-85. It concluded that because KCMSD had violated the constitution by adopting policies which perpetuated rather than eliminated segregation, it was inappropriate to award attorneys' fees to a constitutional violator.

In determining who should pay the plaintiffs' fee, the court observed that the State of Missouri was the primary constitutional violator. Moreover, the district court noted that KCMSD had cooperated closely with the plaintiff and in fact had originally been a plaintiff before the court realigned it as a defendant in 1978. Also, KCMSD had ad-

mitted liability prior to trial, while the State had persisted in denying liability throughout the ten and a half month trial on liability issues. Accordingly, the court concluded that KCMSD would not be liable for the attorneys' fees and expenses and that the award of fees should be imposed solely against the State.

Before we consider the contentions of the parties with respect to the fee, we reiterate the concern of the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), that the attorneys' fee issue should not result in a second major litigation and that ideally the litigants will settle the amount of the fee. *Id.* at 437.

I. *Missouri's Appeal.*

The State first argues that the district court erred in compensating the plaintiffs for time spent on the unsuccessful claims against prevailing defendants and in failing to further reduce the compensable hours due to plaintiffs' partial success as compared to the scope of the litigation as a whole. The State points out that the district court accepted the *Hensley* reductions made by plaintiffs, which resulted in a fee based on roughly 85 percent of the total hours worked, in spite of plaintiffs' lack of success on their interdistrict claim.

Hensley v. Eckerhart provides the guidance for setting fee awards in cases where plaintiffs were less than totally successful:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the award of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

461 U.S. at 440.

In this case, the plaintiffs made unsuccessful claims against the State as well as the suburban, federal, and Kansas defendants for interdistrict relief. They also made successful intradistrict claims against the State and KCMSD. The district court found that the plaintiffs appropriately excluded hours that did not relate to the claims on which plaintiffs prevailed, and that the remaining hours either related solely to the successful claims or related to them as well as to unsuccessful claims and the time could not be set aside as devoted to the unsuccessful claims. This allocation of hours among the various claims is a finding of fact, which we can reverse only if clearly erroneous. *See City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686, 2693 (1986); 106 S. Ct. at 2699 (Powell, J. concurring).

The State argues that reduction of the hours worked by only about 15% cannot be an adequate reduction for the time spent on claims against prevailing defendants. It is true that much of the testimony and much of the effort at trial was pointed toward relief that was not obtained. Our acquaintance with the record in this case from consideration of the appeal on the merits convinces us that many of the issues were separate in nature, but also that a substantial portion of the testimony that bore upon the unsuccessful claims was closely interrelated with the re-

maining claims. The parties briefed this question in detail before the trial court, explaining why they believed each time entry was or was not compensable. Were we to fix the initial percentage reduction of the time spent by plaintiffs' counsel, we might not have arrived at the same result as the district court. However, upon review of the record, we cannot say that the district court's finding was clearly erroneous, and we may not substitute our own findings for those of the district court. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504 (1985).

The state argues that the district court failed to consider the degree of success obtained as required by *Hensley*. While the district court could have been more explicit in this respect, we are satisfied that the parties forcefully brought to the attention of the district court the analysis required by *Hensley* and that the district court faithfully applied *Hensley* in awarding the fee. In focussing on the time relating solely to the successful claims or so closely interrelated to those claims that it could not be separated or reduced and determining a reasonable fee, the district court gave proper weight to the degree of success. *See McCurry v. Tesch*, 824 F.2d 638, 642 (8th Cir. 1987).

The State's proposed second reduction would amount to a double deduction by taking away hours relating to the successful claim because of unsuccessful ones, which have already been the subject of reduction. "A court should not disallow attorney hours related and necessary to successful claims." *Catlett v. Missouri Highway and Transportation Commission*, 828 F.2d 1260, 1270 (8th Cir. 1987); *see Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1137 (11th Cir. 1984). A second *Hensley* deduction is not appropriate. *Accord Rogers v. Okin*, 821 F.2d 22, 25, 29 (1st Cir. 1987), *petition for cert. filed* (Nov. 3, 1987) (district court correctly deleted only time wholly unrelated to successful claim).

The State next argues that the district court erred in considering delay in payment as a factor in setting plaintiffs' attorneys' hourly rates. The State relies on *Library of Congress v. Shaw*, ... U.S. ....., 106 S. Ct. 2957 (1986), and *Rogers v. Okin*, 821 F.2d 22 (1st Cir. 1987), for the proposition that the district court's consideration of delay constituted an award of interest that violated the eleventh amendment. We are not persuaded by this argument.

Shaw involved an award of attorneys' fees in a Title VII case against the federal government, in which the district court increased the lodestar by 30% to compensate for delay in payment. The Supreme Court reversed on the grounds that the award of interest on the fees was forbidden by the "no-interest" rule, which requires a specific waiver of the federal government's sovereign immunity with regard to interest, in addition to the waiver of immunity on the underlying cause of action.

In *Rogers* the First Circuit analogized from *Shaw* to forbid an award of fees against a state based on current hourly rates. 821 F.2d at 26-28. We cannot agree with the *Rogers* court that the holding in *Shaw* is applicable in a case involving eleventh amendment, rather than federal sovereign immunity, or to a case where the court awards current rates or considers delay as one factor in setting a compensatory fee award.

First, *Shaw* was expressly based on the "no interest" rule of statutory interpretation applicable in suits against the federal government. 106 S. Ct. at 2962-63. *Rogers* does not explain why it considers *Shaw's* federal sovereign immunity holding applicable in an eleventh amendment

setting, and indeed *Rogers* acknowledges that the two areas of law carry "different standards of statutory interpretation." 821 F.2d at 27. We see no reason to extend *Shaw* to the body of eleventh amendment law, which was not covered by its rationale.

Second, *Rogers* assumes that compensation for delay equates with prejudgment interest, and we are not satisfied that it does. *Shaw* leaves open a distinction between a separately stated enhancement for delay, such as the thirty percent enhancement in *Shaw*, which it regarded as interest, and merely considering delay as one factor in setting the hourly fee, as the district court did in this case. Judge Ginsburg dissented from the Court of Appeals decision allowing interest in *Shaw, Shaw v. Library of Congress*, 747 F.2d 1469, 1485-93 (D.C. Cir. 1984), arguing that "use of current rather than the historical hourly rates in order to compensate for delay, or use of historical rates that were based on expected delay . . . would not run afoul of the no-interest rule." 106 S. Ct. at 2961 (summary by Blackmun, J.). In the Supreme Court's opinion, Justice Blackmun adverted to Judge Ginsburg's dissent without disapproval. *Id.*

At any rate, the eleventh amendment is not a barrier to recovery of fees against a state under section 1988, *see generally Hutto v. Finney*, 437 U.S. 678, 693-94 (1978), and the courts have regularly interpreted section 1988 to permit compensation for delay in the payment of fees, *e.g.*, *Sisco v. J. S. Alberici Construction Co.*, 733 F.2d 55, 59 n.3 (8th Cir. 1984); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 951, 955 (1st Cir. 1984); *Daly v. Hill*, 790 F.2d 1071, 1081 (4th Cir. 1986); *Lightfoot v. Walker*, 826 F.2d 516, 523 (7th Cir. 1987); *Jordan v. Multnomah County*, 815 F.2d 1258, 1262-63 n.7 (9th Cir. 1987); *Ramos v. Lamm*, 713 F.2d 546,

555 (10th Cir. 1983); *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565, 1572 (11th Cir. 1985). In *Pennsylvania v. Delaware Valley Citizens' Council*, 107 S. Ct. 3078, 3081-82, 3099 (1987), both the majority and dissenting justices seem to have approved award of delay compensation under the "typical fee-shifting statute." But the *Rogers* court premised its holding on its conclusion that § 1988 does not permit compensation for delay: "Our problem in the instant case is that Congress has not yet made any statement suggesting that a § 1988 attorney's fee award should include prejudgment interest." 821 F.2d at 27. The *Rogers* court's decision that section 1988 does not permit delay compensation runs counter to the generally accepted view of that statute, and we will not disregard the established body of section 1988 law.

We hold that the district court properly considered delay in establishing the hourly rate.

The State also argues that the district court erred in allowing fees for paralegals and law clerks in excess of $15 per hour, which the State "suggests" is the cost to plaintiffs' attorneys of hiring the clerks and paralegals. We recognize that other courts have approached this question differently, some viewing paralegal work as a cost to be reimbursed and others as a portion of the fee, to be given market treatment. This circuit has not resolved this question, although we have stated that "[p]aralegal fees should be allowed if reasonable and not duplicative of other legal fees." *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 817 (8th Cir. 1983). We believe that market considerations should govern, but it is not necessary to adopt an ironclad rule in this case. Suffice it to say that the district court found that $40 per hour for paralegals and

$35 per hour for law clerks were reasonable fees, slip op. at 7, and we cannot say its determination was clearly erroneous.

The State raises numerous other issues dealing with granting plaintiffs' excessive hourly billing rates and litigation expenses, particularly expert witness fees for James Anderson. While we acknowledge that some of the State's arguments have some force, we conclude that the district court's determinations in these respects were not clearly erroneous.

In its appeal against the KCMSD the State argues that the district court erred in failing to impose 50 percent of the liability for fees and expenses on KCMSD.[4] The district court justified the allocation of the fee by pointing to its earlier conclusion that the State of Missouri was the primary constitutional violator. By contrast KCMSD did not cause the unlawful segregration but simply failed, as did the State, to disestablish the dual school system created by the State of Missouri and adopted policies which were ineffective in eliminating the unlawful segregation. Moreover, the court pointed to the fact that KCMSD had cooperated with the plaintiffs and had conceded liability prior to trial, while the State denied liability, thereby contributing to the necessity of a ten and a half month trial. Thus, in effect the district court concluded that KCMSD minimized the need for plaintiffs to incur attorneys' fees, while the State maximized the need.

---

4. KCMSD and the State rely in their briefs on unpublished opinions of this court in the St. Louis school desegregation case. Under our Rule 8(i), unpublished opinions may not be cited except when related to the case at bar "by virtue of an identity between the parties or causes of action." In any event, we do not consider those opinions to be applicable or persuasive in considering the order before us.

The district court based its award on the defendants' relative degrees of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants. Both factors are appropriate considerations in determining who must shoulder the fees award. *See Rose v. Nebraska*, 748 F.2d 1258, 1264 (8th Cir. 1984), *cert. denied*, 474 U.S. 817, 106 S. Ct. 61 (1985), and *Charles v. Coleman*, 689 F.2d 774, 777 (8th Cir. 1982) (degree of liability considered in allocating responsibility for fees); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 960 (1st Cir. 1984); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1125-26 (9th Cir. 1981) (relative time); *see generally Little Rock School District v. Pulaski County Special School District No. 1*, 787 F.2d 372, 374 (8th Cir.) (Arnold, J., concurring and dissenting), *cert. denied*, 106 S. Ct. 2926 (1986) (relative culpability and relative litigation time relevant).

The State argues that fees should be allocated in the same percentages as liability for the costs of the substantive relief. However, the criteria for liability on the merits and for liability for fees are different—obviously, the court could not consider the amount of time spent litigating against the respective defendants when it apportioned liability for the substantive relief, but that is an appropriate consideration in apportioning liability for fees.

The district court's allocation of fees is reversible only in the event of abuse of discretion. *See Adams*, 657 F.2d at 1126. The reasons given by the district court in this case adequately supported its decision to place responsibility for the fees on the State.

II. *KCMSD'S Appeal*

We reject KCMSD's argument that it is entitled to attorneys' fees. In essence, the district court concluded that KCMSD in its cross-claim against the State simply reiterated claims made by the Jenkins class and insofar as KCMSD had been improved by the remedial plans, these plans would have been ordered as a result of plaintiffs' claims regardless of KCMSD's cross-claim. In addition, KCMSD had been adjudged a constitutional violator and the court determined it was therefore inappropriate to award it attorneys' fees. Under section 1988 a prevailing plaintiff is entitled to an award of attorneys' fees " 'unless special circumstances would render such an award unjust.' " S. Rep. No. 94-1011, 94th Cong. 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912. Though a district court's discretion in determining when such special circumstances exist is narrowly limited, *see New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980) (title VII), the district court did not abuse its discretion in finding them here.

KCMSD cites our case of *United States v. Arkansas*, 791 F.2d 1573 (8th Cir. 1986), in support of its argument that the court should not have considered KCMSD's role as constitutional violator in determining that special circumstances would make an award of attorneys' fees in favor of KCMSD unjust. There, while the school districts had been held liable, the district court attempted to assess the entire cost of consolidating against the state, based on a finding that gerrymandering had resulted from the requirements of Arkansas law mandating segregation. 791 F.2d at 1575. In contrast to the situation assumed in *United States v. Arkansas*, in this case KCMSD was not only liable,

but this court determined it was appropriate for KCMSD to pay 50% of the costs of the remedy. *Jenkins*, 807 F.2d at 684-86. Under these circumstances, the district court acted within its discretion in determining that it would be unjust to award KCMSD its fees against the State.

III. *Plaintiffs' Appeal.*

Plaintiffs argue that they are entitled to an enhancement of the fee awarded for Attorney Benson on the grounds that he is entitled to compensation for litigating the case on a contingency basis.

The district court's order was entered before the Supreme Court handed down its decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ... U.S. ....., 107 S. Ct. 3078 (1987) (*Delaware Valley II*), which clarified the prerequisites for enhancement of a fee award for contingency. There was no majority opinion in *Delaware Valley II*, but Justice O'Connor's concurrence in judgment formed a majority for the holding that a contingency enhancement would be permissible in some circumstances, and another majority for the holding that such circumstances did not exist in the *Delaware Valley II* case. Justice O'Connor stated that contingency enhancements should be awarded only on proof that the relevant market compensates for contingency cases as a class, rather than on proof of any particular risks peculiar to the case in question. 107 S. Ct. at 3090-91. Specifically, Justice O'Connor would require proof that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.' " *Id.* at 3091 (quoting plurality opinion, 107 S. Ct. at 3089).

The district court in this case denied plaintiffs a contingency enhancement based on the plaintiffs' high likelihood of success in the particular substantive case at bar; the court's criteria were not those adopted by Justice O'Connor, who disapproved enhancement decisions based on "legal risks" peculiar to a particular case. However, plaintiffs would have fared no better under Justice O'Connor's analysis, since they failed to adduce proof that they would have faced substantial difficulties finding representation without an adjustment for contingency. While plaintiffs presented evidence that the Kansas City market generally compensates successful attorneys for assuming the risk of contingency cases, they did not introduce any evidence about availability of counsel to plaintiffs in the absence of contingency adjustments. Several attorneys testified that they would not have taken the case at all, and one civil rights litigator testified he would not have taken the case without regular payments. Testimony of these individuals comes short of proof that adjustment for contingency was a crucial factor in plaintiffs' ability to obtain counsel. *See generally Blum v. Witco Chemical Corp.*, 829 F.2d 367, 380-81 (3d Cir. 1987). On the record, we do not discover the proof required by Justice O'Connor as prerequisite for award of a contingency enhancement. *See Catlett*, 828 F.2d at 1271.

Plaintiffs also argue that they should receive enhancement for the risk inherent in this particular case in accordance with the *Delaware Valley II* views of Justice Blackmun. However, Justice O'Connor disapproved Justice Blackmun's suggestion of enhancement for extraordinary legal risk in a particular case, 107 S. Ct. at 3090, and therefore Justice Blackmun's views did not command a majority of the Court. Furthermore, the district court specifically

held that this case did not involve extraordinary risk of failure and this finding is not clearly erroneous. Therefore, even under Justice Blackmun's views, the plaintiffs are not entitled to a contingency enhancement for extraordinary risk in this case.

The judgment of the district court is affirmed in all respects.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, MAY 11, 1987

(Filed May 11, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

Several motions for awards of attorney's fees and expenses are presently before the Court. Plaintiffs' co-counsel, Arthur Benson, has moved for $3,310,587.00 in fees and expenses for services rendered by him and his staff through June 30, 1986. The Court will award Mr. Benson and his staff $1,614,437.43 for these services. Having previously received $347,332.93 of this amount, the balance due Mr. Benson for these services is $1,267,104.50.

In addition, Benson has requested $72,702.49 in fees and expenses incurred in litigating his fee application. The Court will award this amount. The Legal Defense Fund (LDF), co-counsel for the plaintiffs in this case, moved the Court for $3,170,600.20 in fees and expenses for services rendered through May 31, 1985. The Court will award the LDF $2,323,730.60 for these services. In addition, the LDF seeks $65,411.64 in fees and expenses incurred in pursuing its fee application. The Court will award the LDF $42,145.14 for such services. The State of Missouri defendants will be solely liable for the fees and expenses awarded by the Court. Co-defendant KCMSD has moved the Court for $1,298,198.70 in attorney's fees and litigation expenses for services rendered through June 30, 1986. This motion will be denied. Intervenor Kansas City Missouri Federation of Teachers Local 691 moved the Court for $62,169.37 in attorney's fees and expenses incurred through March 1, 1987. This motion will be denied.

BENSON AND STAFF

Pursuant to 42 U.S.C. § 1988, the Court may allow the prevailing parties in this suit a reasonable fee as part of the costs. However, the plaintiffs in this case may only be considered prevailing parties for attorney's fees purposes if they succeeded on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), *quoting Nadeau v. Helegemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). The plaintiffs in this action are undisputedly "prevailing parties" because this Court found in favor of the plaintiffs on their liability claims against the State of Missouri defendants and the KCMSD. *Jenkins v. State of Missouri*, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984).

The first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984). Mr. Benson acknowledges that under *Hensley v. Eckerhart*, 461 U.S. 424 (1983), he and his staff cannot receive compensation for all their time spent on this litigation since the plaintiffs were not successful in their claims against the suburban school districts, the Kansas defendants, and the federal defendants. Accordingly, Mr. Benson excluded from the total time expended by him and his staff approximately 353 hours which he claims was clearly allocable to work done on the unsuccessful claims against these other defendants. The State argues that Benson and his staff failed to exclude additional hours that were expended solely on the unsuccessful claims. Contrary to the contentions of the State of Missouri, the Court finds that the specific exclusions made by Benson and his staff accurately represent the time allocable to unsuccessful claims in the litigation, and which was "distinct in all respects" from time spent on their successful claims. *Hensley v. Eckerhart*, 461 U.S. at 440.

The State also argues that the remaining time should be reduced by 50% because the plaintiffs were unsuccessful on their claim of interdistrict liability against the State and various other defendants. The Court finds that these remaining hours either related solely to the successful claims made by the plaintiffs against the State and the KCMSD, or were so closely interrelated among the remaining claims that they cannot be separated or reduced by some arbitrary percentage.

Finally, the State also requests an additional reduction of 5% for alleged duplication of effort. The State argues

that because the plaintiffs utilized thirteen attorneys and numerous staff personnel in this case that there was "inevitably" some duplication of effort. Having examined the time records submitted by Benson and his staff, the Court finds no such duplication. Retention of numerous attorneys and a large staff in this lengthy and complicated school desegregation case is certainly understandable and is not in itself a ground for reducing the hours claimed. *Johnson v. University College of the University of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983).

For the reasons stated, the Court finds the hours submitted by Mr. Benson and his staff represent the time reasonably expended on this litigation.

The next step in arriving at reasonable attorney's fees is the determination of a reasonable hourly rate. In making such a determination, the Court has carefully considered the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) that have been adopted by the Eighth Circuit. E.g., *Hardman v. Board of Education of Dollarway, Arkansas*, 714 F.2d 823, 825 (8th Cir. 1983). Among these factors are the customary fee of the attorney and his experience, reputation and ability. The Court finds that Mr. Benson does not regularly charge an hourly rate in his civil rights practice. Therefore, the Court must consider the current Kansas City, Missouri hourly rate for attorneys with the litigation experience and expertise comparable to that of Mr. Benson.

It is undisputed that Mr. Benson is an experienced trial attorney who is widely recognized as a highly qualified civil rights attorney in the Kansas City, Missouri area. Based on the evidence presented to the Court, the Court finds that the hourly rates for Kansas City, Missouri at-

torneys with litigation experience and expertise comparable to that of Mr. Benson range from $125.00 to $175.00 per hour. The Court finds that Mr. Benson's rate would fall at the higher end of this range based upon his expertise in the area of civil rights.

Two additional *Johnson* factors are particularly applicable in this case, i.e., the preclusion of other employment by the attorney due to acceptance of a case, and the undesirability of a case. The Court finds that from early 1983 until the end of 1985 Benson devoted nearly all of his professional time to this case and was thereby precluded from accepting other employment. Similarly, Benson's staff was also precluded from other employment for a period of at least one year while working full time on this litigation.

The undesirability of this case should also be considered in determining Benson's reasonable hourly fee. Undeniably, this case has been very unpopular with many Missouri citizens as evidenced by various statements, editorials, articles and letters from parents, taxpayers and state officials.

In addition, the Court has considered delay in payment, a factor not listed in *Johnson*, in determining a reasonable attorney's fee for Benson's services. Mr. Benson's application is for services rendered from March, 1979 through June 30, 1986. It is essential that his hourly rate include compensation for the delay in payment. *Jorstad v. IDS Realty Trust*, 643 F.2d 1305 (8th Cir. 1981).

Accordingly, having carefully considered the twelve factors set forth in *Johnson*, and the additional factor of delay in payment, the Court finds that a reasonable hourly rate for Mr. Benson's services from 1979 through June

30, 1986, is $200.00 per hour. This rate, multiplied by the number of hours reasonably expended by Mr. Benson on the litigation, results in an attorney's fee of $1,004,160.00. The Court will award Mr. Benson this amount for attorney's fees for services rendered through June 30, 1986.

Mr. Benson had requested an hourly rate of $125.00 an hour which when multiplied by his reasonable hours expended totals $627,600.00. However, he also requested additional awards of $370,042.00 for "quality of representation" and $1,135,800.00 for the "risk of nonpayment," creating a total fee request for his services of approximately $2.1 Million Dollars.

The Court finds that Benson's request is improper because under *Blum v. Stenson*, 465 U.S. 886, 898-900 (1984) the "quality of representation," along with the "novelty and complexity of the issues," "the special skill and expertise of counsel," and the "results obtained" from the litigation are presumably fully reflected in the product of the reasonable hours and a reasonably hourly rate, and thus cannot serve as an independent basis for increasing the basic fee award. In the present case, the quality of Benson's representation as well as the other factors mentioned above, are fully reflected in the $1,004,160.00 fee calculated by the Court.

The Court is aware that an upward adjustment is permissible in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rate charged and that the success was exceptional. *Blum v. Stenson*, 465 U.S. at 899. However, while Mr. Benson certainly provided quality representation in this case, the Court does not find that this is the "rare case" which warrants an upward adjustment.

The question of upward adjustment based on the risk of loss, or as described by the plaintiffs, risk of nonpayment, was left open in *Blum v. Stenson, supra*. However, in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, No. 85-5, slip op. at 20-21 (July 2, 1986), the Supreme Court reset the case for argument on that particular issue. To date, no such opinion has been rendered. Notwithstanding, the Court finds that the plaintiffs' likelihood of success in their claim against the State of Missouri defendants was very high, and thus Benson's risk of nonpayment very slight, because the State had mandated segregated schools for black and white children prior to 1954 and had failed to take any affirmative steps to eliminate the unlawful segregation after 1954. This small risk of nonpayment is fully reflected in the reasonable attorney's fee calculated by the Court.

Benson also requests a fee award for the services of four attorneys whom he employed to assist him in the litigation of this case. Two of these attorneys, Ms. Burkdoll and Ms. Goering, were associates of Mr. Benson and billed 97% of the hours submitted by these four attorneys on the fee application. Mr. Benson requests an hourly rate of $80.00 per hour for Ms. Burkdoll and Ms. Goering. The evidence presented to the Court establishes that current Kansas City, Missouri hourly rates for associates with experience and expertise comparable to Ms. Burkdoll and Ms. Goering range from $60.00 to $95.00 per hour. After careful consideration, the Court finds that $80.00 per hour is a reasonable hourly rate for their services. The Court notes that the $80.00 per hour rate is approximately $15 to $20 higher than the average hourly rate for Kansas City associates in 1982-84, the years in which Ms. Burkdoll and Ms. Goering compiled their hours. However, the differential is necessary to compensate Mr. Benson for the delay

in payment. Accordingly, the Court will award Mr. Benson a total of $304,348.00 in fees for services rendered by Ms. Burkdoll and Ms. Goering from 1982 to 1984.

Benson also requested that he be awarded enhancements of $319,328 and $287,912 for the services of Ms. Burkdoll and Ms. Goering for the risk of nonpayment. As previously stated, the risk of nonpayment was very small and is fully reflected in the $80.00 per hour rate found to be reasonable by the Court.

The remaining two attorneys employed by Mr. Benson, Mr. Routman and Mr. Thomas, collectively compiled 89 hours from 1981 through 1983. At the time they began assisting Mr. Benson in this litigation, Mr. Routman had ten years of legal experience and Mr. Thomas five. Both are presently partners in Kansas City, Missouri law firms. After careful consideration, the Court finds that the hourly rate of $90.00 for Mr. Routman and $85.00 per hour for Mr. Thomas requested in the fee application are reasonable for the Kansas City, Missouri area. Therefore, the Court will award Mr. Benson $7,663.00 in attorney's fees for the services of Mr. Routman and Mr. Thomas.

Mr. Benson also requested an enhancement of the above award for the risk of nonpayment. Again, the Court finds that such a risk is very small and is fully reflected in the hourly rates calculated by the Court.

Mr. Benson also employed seven paralegals and four law clerks for whom he requests fees. The evidence presented to the Court indicates that the current City hourly rates is $40.00 an hour for paralegals and $35.00 for law clerks, the rates requested by Mr. Benson. Therefore, the Court finds that the requested rates are reasonable for the services rendered and will award Mr. Benson $225,084.50

for paralegal and law clerk fees. Furthermore, the Court notes that it has adequately compensated Mr. Benson for the delay in payment by calculating this award based upon the current, rather than the historical, hourly rates.

In addition, Mr. Benson requests $73,182.43 in litigation expenses that he has personally incurred from 1979 to June 30, 1986. The Court has carefully reviewed these expenditures and finds them necessary and reasonable in cost. Therefore, the Court will award the requested amount.

Mr. Benson also seeks $72,702.49 in fees and expenses incurred in preparing and litigating his fee application. Such fees and expenses are compensable under 42 U.S.C. § 1988. *Doulin v. White*, 549 F.Supp. 152, 159 (E.D. Ark. 1982). Mr. Benson was represented in his fee application by Mr. Russell Lovell, a professor of law at Drake University. Mr. Lovell is a regular lecturer on civil rights litigation, including attorney's fees. Prior to joining the law faculty at Drake University, Mr. Lovell practiced law for five years and served as counsel of record in approximately twenty federal court civil rights cases. Based upon the skill and experience of Mr. Lovell and type of work involved, the Court finds that $125.00 per hour is a reasonable Kansas City, Missouri hourly rate for preparing and litigating this fee application. The Court finds that the time records submitted by Mr. Lovell represent hours reasonably expended on the fee application. Therefore, the Court will award $47,387.50 for services rendered by Mr. Lovell.

Mr. Benson requests a fee of $10,125.00 for his services in litigation of his fee application. Having reviewed the time records submitted by Mr. Benson, the Court finds

that the 81 hours listed represent time that was reasonably expended on the litigation. In addition, the Court finds that the $125.00 hourly rate requested by Mr. Benson is a reasonable rate for the work performed. Therefore, the Court will award Mr. Benson the amount requested.

In addition, Mr. Lovell and Mr. Benson collectively employed three paralegals and two law clerks to assist in the preparation of the fee application. The Court has reviewed the hours submitted by these individuals and finds them reasonable. Furthermore, the rates requested, $40.00 per hour for paralegals and $35.00 per hour for law clerks, are certainly reasonable rates for the Kansas City area. Therefore, the Court will award the $7,865.00 in fees requested for these staff members.

Finally, Mr. Benson requests $7,324.49 for expenses incurred in litigation of this fee application. Having reviewed the records submitted, the Court finds that these expenditures were necessary and their cost reasonable and will award the amount requested.

In summation, the Court finds that Mr. Benson and his staff are entitled to a total award of $1,687,139.92 in fees and expenses for services rendered from 1979 to June 30, 1986, and for fees and expenses incurred in litigating his fee application. To date, Mr. Benson has received $347,332.93 of this amount, leaving a balance due of $1,339,806.99.

THE LEGAL DEFENSE FUND

The Court finds that this highly complex case required resources far beyond those available to Mr. Benson. Therefore, it was necessary for Mr. Benson to obtain the assistance of an organization such as the LDF. The LDF

entered the case in March, 1982 as co-counsel for the plaintiffs and is now requesting an award of $3,170,600.20 in fees and expenses for services rendered through May, 1985.

Approximately $2.5 Million of the total amount requested by the LDF represents fees of attorneys, paralegals and law clerks. As stated previously, the first step in determining a reasonable fee is to multiply the number of hours reasonably expended on the litigation times a reasonable hourly rate. *Blum v. Stenson,* 465 U.S. 886, 888 (1984). Regarding the hours submitted by the LDF, the Court finds that the LDF properly excluded the time that was clearly allocable to work done on the unsuccessful claims pursuant to *Hensley v. Eckerhart,* 461 U.S. 424 (1983). The Court finds that the remaining hours, except for 3.5 hours submitted by Mr. Liebman for a 12-21-83 flight from Kansas City to New Mexico, were reasonably expended on the litigation, and are deserving of compensation.

In determining a reasonable hourly rate for the services of the various LDF attorneys and support personnel, it is noteworthy that such fees are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. *Blum v. Stenson,* 465 U.S. at 895. The "relevant community" is the "general locality in which the litigation takes place." *International Travel Arrangers, Inc. v. Western Airlines, Inc.,* 623 F.2d 1255, 1275 (8th Cir. 1980). Therefore, the hourly rates to be awarded the attorneys and staff of the New York based LDF will be determined according to Kansas City, Missouri rates.

Seven of the LDF staff attorneys assisted Mr. Benson in the litigation of this case from March 1982 to May 1985.

In determining a reasonable hourly rate for each attorney's services, the Court has considered the twelve factors in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d at 717-19. The LDF attorneys are salaried and do not charge a customary fee. Therefore, the Court must judge the experience, reputation and ability of the individual attorneys and determine a reasonable hourly rate for a Kansas City, Missouri attorney with similar experience and expertise. Based upon the evidence presented, the Court finds that the current Kansas City, Missouri hourly rate for attorneys with litigation experience and expertise comparable to that of LDF attorneys Liebman, Johnston, and Lief range from $125 to $175 per hour. In addition, the Court finds that these attorneys are entitled to compensation for delay in payment. Therefore, the Court will award the LDF attorney's fees at the current, rather than historical, rates. Accordingly, the Court finds that the $160.00 requested by Mr. Liebman is a reasonable hourly rate and will award the LDF $650,688.00 for his services rendered through May of 1985. Similarly, the Court finds that $175.00 per hour is a reasonable hourly rate for the services of Mr. Johnson and Ms. Lief and will award fees of $62,002.50 and $122,447.50 respectively for their services.

The Court finds that the experience and expertise of attorneys Shaw, Fins, Winter and Hair at the time of their involvement in this case is comparable to that of associates with five or fewer years experience. The current Kansas City hourly rate for such associates ranges from $60.00 to $95.00 per hour. Therefore, the Court finds that a reasonable hourly rate for the services of Mr. Shaw, Mr. Winter, Ms. Hair and Ms. Fins is $95.00 per hour and the Court will award the LDF a total of $384,617.00 for their services.

LDF had requested rates higher than those awarded by the Court claiming that the complexity and scope of the litigation prompted a hiring freeze and precluded it from accepting other cases for which it would receive payment sooner. The Court considered this factor, but finds that during this litigation the LDF employed additional attorneys who were not involved in this litigation and were available for work on other cases.

The LDF also requested the Court to award it a contingency enhancement of $688,874.30. As stated previously, the Court finds that the plaintiffs' risk of loss, and thus the LDF's risk of nonpayment, was very slight and is fully reflected in the reasonable fees calculated by the Court.

In addition, the LDF requests an award for the services of numerous paralegals, law clerks and recent law graduates. Based upon the evidence presented, the Court finds that the requested rates of $50.00 an hour for recent law graduates, $40.00 for paralegals, and $35.00 an hour for law clerks are comparable to the current Kansas City, Missouri rates for these services. Therefore, the Court will award the LDF $431,337.75 in fees for the services rendered from March, 1982 to May 1985.

In addition, the LDF requests $672,637.85 in litigation expenses. The Court has carefully reviewed these expenditures and finds that they were necessary and their cost reasonable. Accordingly, the Court will award the LDF the requested amount.

The LDF also requested an award of $65,411.64 in attorney's fees and expenses incurred in the preparation and litigation of their fee application. The Court has reviewed the time records submitted by the four attorneys who represented the LDF in their fee application and finds

that they contain only those hours that were reasonably expended on the litigation. However, the Court finds that the New York rates requested by these attorneys, ranging from $160.00 to $330.00 per hour, are excessive and do not reflect a reasonable hourly rate in the Kansas City, Missouri area for similar work. As the Court found in considering Mr. Benson's request for attorney's fees incurred in litigating his fee application, $125.00 per hour is a reasonable hourly rate for such work in the Kansas City, Missouri area. Thus, the Court will award the LDF $29,050.00 in fees for services rendered in litigating its fee application.

The LDF also requests $11,441.33 for expenses incurred in litigating its fee application. Having carefully reviewed these expenditures, the Court finds that they were necessary and their cost reasonable and will award the amount requested.

KCMSD

KCMSD requests an award of $1,298,198.70 for attorney's fees and expenses for work performed from March, 1977 through June, 1986. The issue before the Court is whether the Kansas City, Missouri school district is a "prevailing party" within the meaning of 42 U.S.C. § 1988.

A party may be considered a prevailing party for attorney's fees purposes if they "succeed on any significant issue in the litigation which achieves some of the benefit the party sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. at 433. For purpose of analysis of the attorney's fees issues, the "notion of 'prevailing party' is to be interpreted in a practical, not formal, manner." *Northcross v. Board of Education*, 611 F.2d 624, 636 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

This Court did find in favor of the defendant KCMSD on its crossclaim against the State of Missouri defendants. *Jenkins v. State of Missouri*, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984). However, in its crossclaim, the KCMSD simply reiterated the allegations of the plaintiffs that the State of Missouri had failed to take action to dismantle its prior dual school system, and had acted to perpetuate the segregation. This Court found for the plaintiffs on this same claim against the state defendants. *Jenkins v. State of Missouri*, 593 F.Supp. at 1505. While the KCMSD has certainly been improved by the remedial plans ordered by the Court after assessing liability against the State and the KCMSD, it is the plaintiffs, the victims of unlawful segregation, who have benefited by prevailing on this claim originally alleged in their complaint and subsequently made by the KCMSD in its crossclaim against the State of Missouri. Moreover, the Court finds that the same remedial plans would have been ordered, and thus the KCMSD would have received the same benefits, even if it had not reiterated the plaintiffs' allegation in its crossclaim.

In addition, KCMSD in its crossclaim charges that the State should be required to contribute financially to any remedial plan the Court might order as relief against the KCMSD. The KCMSD was adjudged liable for adopting ineffective policies to change the segregative patterns and was subsequently directed to fund approximately 20% of the initial remedy ordered by the Court. *Jenkins v. State of Missouri*, 639 F.Supp. 19 (W.D. Mo. 1986). However, on appeal, the Eighth Circuit held that the desegregation costs ordered by this Court should be divided equally between the KCMSD and the State of Missouri because both were adjudged constitutional violators. *Jenkins v. State of Missouri*, 807 F.2d 657, 684-85 (8th Cir. 1986).

Finally, the KCMSD alleges in its crossclaim, as did the plaintiffs in their complaint, that the State is liable for interdistrict violations. It is undisputed that the KCMSD and the plaintiffs failed in their attempt to prove an interdistrict liability against the State of Missouri.

Therefore, after a closs examination of the KCMSD's crossclaim against the State of Missouri defendants, the Court finds that the KCMSD, as a practical matter, is not a "prevailing party" within the meaning of 42 U.S.C. § 1988.

Notwithstanding the foregoing analysis, there exists a separate and compelling reason why the KCMSD should not be awarded attorney's fees and expenses in this case. In *Jenkins v. State of Missouri*, 593 F.Supp. 1485 (W.D. Mo. 1984), this Court found that the KCMSD had violated the United States Constitution by adopting policies which perpetuated, rather than eliminated, segregation in its schools. Therefore, the Court finds it inappropriate to award attorney's fees to a constitutional violator.

Accordingly, the KCMSD's motion for an award of attorney's fees and expenses will be denied.

AFT 691

Intervenor Kansas City, Missouri Federation of Teachers Local 691 (AFT 691) requests an award of $62,169.37 for attorney's fees and expenses incurred through March 1, 1987. This determination lies within the sound discretion of this Court. *Little Rock School District v. Pulaski County Special School District*, 787 F.2d 372 (8th Cir. 1986).

As noted several times in this opinion, a party may be considered a prevailing party under 42 U.S.C. § 1988

if it succeeds on any significant issue in the litigation which achieved some of the benefits the party sought in bringing suit. *Hensley v. Eckerhart*, 461 U.S. at 433. AFT 691 was granted leave to intervene in this case on November 5, 1985, following the Court's liability order of September 17, 1984. AFT 691 had sought leave to intervene to protect the interests of its members and to assist the Court in fashioning a remedy to further integration. Notwithstanding, AFT 691's participation in this litigation has been de minimis. As other courts have recognized, this Court finds that an intervenor should not be awarded attorney's fees unless it has played a significant role in the litigation. *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 85 (1985).

Accordingly, AFT 691's application for attorney's fees and expenses will be denied.

LIABILITY FOR THE FEES AND EXPENSES AWARDED

For the reasons set forth in this opinion, the Court will award the plaintiffs approximately $4 Million in attorney's fees and expenses for work performed in this case. The remaining question before the Court is against whom will these fees be charged.

Plaintiffs succeeded on their liability claim against the State of Missouri defendants in this case. *Jenkins v. State of Missouri*, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984). This Court found the State of Missouri to be the primary constitutional violator because it had mandated separate schools for black and white children prior to 1954, and after 1954 had failed to take any affirmative action to eliminate the vestiges and devastating effects of the dual school system it had created. *Jenkins v. State of Missouri*,

593 F.Supp. at 1505-06. Accordingly, the Court finds that the State of Missouri defendants are liable for the attorney's fees and expenses to be awarded plaintiffs' counsel in this case.

This Court also found in favor of the plaintiffs in their claim against the KCMSD. *Jenkins v. State of Missouri*, 593 F.Supp. at 1505. However, the Court did not find that the KCMSD caused the unlawful segregation within its district, but rather that it failed to fulfill its constitutional obligation to act to disestablish the dual school system created by the State of Missouri. *Jenkins v. State of Missouri*, 593 F.Supp. at 1504. This Court found that the KCMSD had adopted policies which were ineffective in eliminating the unlawful segregation. *Id.*

Despite the adjudged constitutional violations of the KCMSD, the Court finds that the KCMSD is not chargeable for the attorney's fees and expenses to be awarded by the Court. The KCMSD, originally a plaintiff in this action, was involuntarily made a defendant by the Court in 1978. *School District of Kansas City, Missouri v. State of Missouri*, 460 F.Supp. 421, 445 (W.D. Mo. 1978). After 1978, the KCMSD and the plaintiffs cooperated closely in the development and prosecution of the litigation and the KCMSD actually acknowledged prior to trial that it had violated the constitutional rights of the plaintiffs.

In addition, the Court notes that in May, 1980 the State of Missouri defendants were adjudged "primary constitutional violators" in the St. Louis school desegregation case on facts very similar to those in the present case. *Liddell v. Board of Education of the City of St. Louis, Missouri*, 491 F.Supp. 351, 359 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir. 1981). Despite this finding, the State of Missouri de-

fendants persisted in denying liability during the 10 1/2 month trial in this case on the liability issues.

For the reasons stated, the Court will order that the State of Missouri defendants are solely liable for the $4,053,015.66 in fees and expenses to be awarded the plaintiffs in this case.

Accordingly, it is hereby

ORDERED that the Court awards Mr. Benson $1,614,437.43 in fees and expenses for services rendered by him and his staff from 1979 through June 30, 1986; and it is further

ORDERED that the Court awards Mr. Benson $72,702.49 in fees and expenses incurred in litigating his fee application; and it is further

ORDERED that because Mr. Benson has previously received $347,332.93 of this award, the balance due Mr. Benson is $1,339,806.99; and it is further

ORDERED that the Court awards the LDF $2,323,730.60 in fees and expenses for services rendered through May of 1985; and it is further

ORDERED that the Court awards the LDF $42,145.14 for fees and expenses incurred in litigating its fee application; and it is further

ORDERED that the State of Missouri defendants are solely liable for the $4,053,015.66 in fees and expenses awarded by the Court, including the $347,332.93 the State has previously paid Mr. Benson; and it is further

ORDERED that the KCMSD's motion for an award of attorney's fees and expenses is denied; and it is further

ORDERED that AFT 691's motion for an award of attorney's fees and expenses is denied.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: May 11, 1987

SUMMARY OF FEES/EXPENSES AWARDED

Benson and Staff

		Hours	Hrly Rate	Award
1.	Attorneys			
	Benson	5,020.8	200	1,004,160.00
	Burkdoll	1,996.0	80	159,680.00
	Goering	1,808.35	80	144,668.00
	Routman	23.0	90	2,070.00
	Thomas	65.8	85	5,593.00
2.	Paralegals/Law Clerks			
	Johnson	3,860.1	40	154,404.00
	Harrison	236.0	40	9,440.00
	Zinn	1,058.3	40	42,332.00
	Chavez	21.5	40	860.00
	Fitzpatrick	95.4	40	3,816.00
	Borge	96.9	40	3,876.00
	Pugh	210.0	40	8,400.00
	DeSimone	24.8	35	868.00
	Mansour	19.3	35	675.00
	Donohoe	10.3	35	360.50
	Petren	1.5	35	52.50
3.	Expenses			73,182.43
			Subtotal	1,614,437.43
4.	Fees/Expenses in Litigation of Fee Application			
	a. Attorneys			
	Lovell	379.1	125	47,387.50
	Benson	81.0	125	10,125.00
	b. Paralegals/Law Clerks			
	Pugh	40.0	40	1,600.00
	Cole	21.5	40	860.00
	Pence	38.0	40	1,520.00
	Apple	66.0	35	2,310.00
	Krulewitch	45.0	35	1,575.00
	c. Expenses			7,324.99
			Subtotal	72,702.49
			Total Award	1,687,139.92
	Less Amount previously paid to Benson			347,332.93
	Balance of Award due Benson			1,339,806.99

LDF

		Hours	Hrly Rate	Award
1.	Attorneys			
	Liebman	4,066.8	160	650,688.00
	Shaw	2,522.5	95	239,637.50
	Lief	699.7	175	122,447.50
	Fins	1,299.7	95	123,471.50
	Johnston	354.3	175	62,002.50
	Hair	30.5	95	2,897.50
	Winter	195.9	95	18,610.50
2.	Paralegals	3,254.6	40	130,184.00
3.	Law Clerks	5,717.85	35	200,124.75
4.	Recent Law Graduates	2,020.58	50	101,029.00
5.	Expenses			672,637.85
			Subtotal	2,323,730.60
6.	Fees/Expenses in Litigating Fee Application			
	a. Attorneys			
	Liebman	42.5	125	5,312.50
	Ralston	158.1	125	19,762.50
	Topkis	21.8	125	2,725.00
	Chambers	10.0	125	1,250.00
	b. Expenses			13,095.14
			Subtotal	42,145.14
			Total Award	2,365,875.74

APPENDIX D

ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, JULY 14, 1987

(Filed July 14, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,
vs.
STATE OF MISSOURI, et al.,
Defendants.

ORDER

Several motions are presently before this Court. Plaintiffs have moved the Court to amend its order of May 11, 1987 that awarded attorney's fees to plaintiffs' counsel. This motion will be granted in part and denied in part. Plaintiffs also moved the Court to amend the long-range magnet school order of November 11, 1986 to add the extended day program to the two environmental science elementary magnet programs at North Rock Creek and Korte Schools. This motion will be granted. Finally, the State

of Missouri has moved the Court to strike KCMSD's Suggested Findings and Conclusions regarding the year 3 desegregation budget. This motion will be denied.

Motion to Amend Attorney's Fees Order

Plaintiffs moved the Court to amend its May 11, 1987 attorney's fees order to award Mr. Benson and his staff additional fees and expenses for their services rendered in monitoring the remedial programs from June 14, 1985 through June 14, 1986. Mr. Benson had requested $42,090.45 for these services on July 1, 1986 but had failed to include this request in his summary of fees requested that he filed with the Court on March 13, 1987. In the present motion, Benson has increased his request for these monitoring services to $52,781.45.

This Court previously found that the hourly rates for the Kansas City, Missouri attorneys with litigation experience and expertise comparable to that of Mr. Benson range from $125 to $175 per hour. See May 11, 1987 order at p. 4. The Court also found that Mr. Benson's rate would fall at the higher end of this range based upon his expertise in the area of civil rights. *Id.* After considering the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1984), and the additional factor of delay in payment, the Court concluded that a reasonable hourly rate for Mr. Benson's services was $200.00. However, this fee was for Mr. Benson's services in litigating the lawsuit, not for his time expended in monitoring the implementation of the remedial plan ordered by the Court. The Court finds that time spent in monitoring the remedial plan should be charged at a substantially lower rate, and recently applied this approach in *G.L., an infant, by and*

through his Next Friend, et al., v. Zumwalt, et al., Case No. 77-0242-CV-W-4, March 27, 1987. Therefore, the Court finds that the $125.00 hourly rate originally requested by Mr. Benson for these services is reasonable. Furthermore, the Court finds that $40.00 per hour for paralegals and $35.00 per hour for law clerks are reasonable rates for these services in the Kansas City area. The Court also finds that the hours submitted by Benson and his staff represent the time reasonably expended in monitoring and implementing the remedial plan in year 1985-86. The number of hours, multiplied by the rates found to be reasonable by the Court, results in an additional fee award of $37,950.00.

In addition, Mr. Benson requests $3,478.00 in expenses incurred in monitoring the remedial plan in 1985-86. Having reviewed the records submitted, the Court finds that the expenditures were necessary and their costs reasonable and awards the amount requested.

Accordingly, the Court awards Mr. Benson and his staff an additional $42,090.45 in fees and expenses incurred in monitoring and implementing the remedial plan in 1985-86. Furthermore, for the reasons set forth in the Court's order of May 11, 1987, the State of Missouri defendants are solely liable for these additional fees and expenses awarded to Mr. Benson and his staff.

The plaintiffs also moved the Court to amend its findings with regard to the number of hours voluntarily excluded by Benson and his staff from their fee applications pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). After re-examining the applications submitted by Mr. Benson, the Court finds that it failed to recognize in its May 11, 1985 order the initial reductions made by Mr. Benson and his staff. With these additional reductions,

the total number of hours excluded by Benson and his staff approximate 4,490 hours and the Court modifies its previous order to reflect this amount. However, this amendment does not affect the Court's previous award of attorney's fees because that award was based solely on the remaining hours for which Benson and his staff requested compensation, hours that the Court found were either related solely to the successful claims made by the plaintiffs against the State and the KCMSD, or were so closely interrelated among the remaining claims that they could not be separated.

Plaintiffs also moved the Court to increase their attorney's fees award to reflect the risk of nonpayment in this case. As previously found by this Court, the plaintiffs' likelihood of success in their claim against the State of Missouri was very high and thus Benson's risk of nonpayment very slight, because of the State's discriminatory actions. This small risk of nonpayment was fully reflected in the reasonable attorney's fees awarded plaintiffs' counsel and therefore the Court denies Mr. Benson's request to increase his award.

Plaintiffs also moved the Court to amend its findings as to the total amount of fees and expenses sought by Mr. Benson and his staff to reflect the $347,332.93 previously paid to Mr. Benson by the State and the $42,090.45 in fees and expenses for services rendered in monitoring the remedial plan in 1985-86. In its order of May 11, 1987, the Court stated that Benson "has moved for $3,310,587.00 in fees and expenses for services rendered by him and his staff through June 30, 1986." This amount simply represented the alleged balance due of the total fee award Mr. Benson was requesting. For clarification, the Court modifies the second sentence of its May 11, 1987 order to read:

Plaintiffs co-counsel, Arthur Benson, has moved for a total of $3,700,010.30 in fees and expenses for services rendered by him and his staff through June 30, 1986.

The above modification has no effect on the amount of fees and expenses awarded by the Court.

Long-Range Magnet School Order

Plaintiffs have moved the Court to amend its long range magnet school order of November 12, 1986 to add the extended day program to the two environmental science elementary magnet programs at North Rock Creek and Korte Schools. This proposal was approved by the Desegregation Monitoring Committee on May 5, 1987 and was agreed upon by all parties at the May 11-12 hearing on the 1987-88 desegregation budget. Accordingly, plaintiffs' motion will be granted and the long-range magnet school order of November 12, 1986 will be modified as requested.

Motion to Strike

On June 15, 1986, the KCMSD filed Suggested Findings and Conclusions relating to the 1987-88 desegregation budget. Subsequently, the State of Missouri moved to strike that pleading claiming it was not permitted by any filing schedule issued by the Court and because the State did not have adequate time to fully respond to KCMSD's suggestions.

Rule 12(f), Fed.R.Civ.P., permits a Court to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Generally, motions to strike are disfavored and in the instant case the State's motion is improper as there is no claim that anything in KCMSD's pleading is redundant, immaterial,

impertinent or scandalous. However, the Court acknowledges that the State may not have had sufficient time to respond to KCMSD's suggestions and therefore did not consider either KCMSD's suggested findings or the State's brief response in ruling on the year three desegregation budget.

Accordingly, it is hereby

ORDERED that the plaintiffs' motion to amend the Court's order of May 11, 1987 regarding attorney's fees is granted in part and denied in part as set forth in this order; and it is further

ORDERED that the Court modifies the long-range magnet order of November 12, 1986 to include the extended day program at North Rock Creek and Korte Elementary Schools; and it is further

ORDERED that the State of Missouri's motion to strike KCMSD's Suggested Findings and Conclusions relating to the 1987-88 desegregation budget is denied.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: July 14, 1987

APPENDIX E

ORDER OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DECEMBER 5, 1986

(FILED DECEMBER 5, 1986)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1765
No. 85-1949
No. 85-1974
No. 85-2077

Kalima Jenkins, by her next friend,
Kamau Agyei,

Carolyn Dawson, by her next friend,
Richard Dawson,

Tufanza A. Byrd, by her next friend,
Teresa Byrd,

Derek A. Dydell, by his next friend,
Maurice Dydell,

Terrance Cason, by his next friend,
Antoria Cason,

Jonathan Wiggins, by his next friend,
Rosemary Jacobs Love,

Kirk Allan Ward, by his next friend,
Mary Ward,

Robert M. Hall, by his next friend,
Denise Hall,

Dwayne A. Turrentine, by his next friend,
Shelia Turrentine,

Gregory A. Pugh, by his next friend,
Barbara Pugh,

Cynthia Winters, by her next friend,
David Winters, on behalf of
themselves and all others
similarly situated,
Appellants/Appellees,

and

American Federation of Teachers,
Local 691,
Appellant/Appellee,

v.

The State of Missouri,

Honorable John Ashcroft, Governor of
the State of Missouri,

Wendell Bailey, Treasurer of the State
of Missouri,

Missouri State Board of Education,
Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President,
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
members of the Missouri State
Board of Education,

Arthur L. Mallory, Commissioner of Education of the State of Missouri,

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellants/Appellees,

Park Hill School District R-5 and Dr. Merlin A. Ludwig, Superintendent thereof,

North Kansas City, Missouri School District and Dr. Raymond Waier, Superintendent thereof,

School District of the City of Independence and Dr. Robert Henley, Superintendent thereof,

Raytown, Missouri Consolidated School District C-2 and Dr. Robert Atkin, Superintendent thereof,

Center School District and Donald Richmond, Superintendent thereof,

Hickman Mills Consolidated School District C-1 and Blaine E. Steck, Superintendent thereof,

Grandview Consolidated School District C-4 and Dr. Tony L. Stansberry, Superintendent thereof,

Fort Osage School District R-1 and Victor Gragg, Superintendent thereof,

Lee's Summit Reorganized School District R-7 and Dr. Bernard C. Campbell, Superintendent thereof,

Blue Springs Reorganized School District R-4 and Dr. Gale T. Bartow, Superintendent thereof,

Liberty School District and Dr. Ronald L. Anderson, Superintendent thereof,

United States Department of Housing and Urban Development and Samuel Pierce, Secretary thereof,

Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: Novmber 13, 1985
Filed: December 5, 1986

Before LAY, Chief Judge, HEANEY, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and WOLLMAN, Circuit Judges, En Banc.*

JOHN R. GIBSON, Circuit Judge.

This case arises from claims of unconstitutional racial segregation of school children in the Kansas City metropolitan area. After trial, the district court[1] imposed an intradistrict remedy against the Kansas City, Missouri School District (KCMSD) and the State of Missouri with the State bearing approximately three-fourths of the cost. The district court found that the KCMSD and the State had not eradicated vestiges of the racially segregated dual school system once required under state law in violation

---

*Judge Bowman did not participate in consideration of this case and Judge Magill was not a member of the court when it was argued and submitted.

1. The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

of the Constitution. The claim for interdistrict relief in the form of consolidation or realignment of the suburban school districts (SSDs) was rejected as the SSDs were found to have eliminated all vestiges of their segregated school systems and there was no finding of interdistrict violation or interdistrict effect. The SSDs were dismissed from the action. The United States Department of Housing and Urban Development (HUD) also was held not liable. In this appeal, both the KCMSD and Kalima Jenkins, the named plaintiff in a certified class of present and future KCMSD students (Jenkins class),[2] challenge the denial of interdistrict relief. The Jenkins class also appeals the judgment in favor of HUD. In addition, both the KCMSD and the State challenge the scope and the allocation of costs of the intradistrict remedy ordered against each.

The district court's findings and conclusion that the suburban school districts are not liable for interdistrict violation and may not be ordered to participate in interdistrict relief, on those issues not related to housing, are affirmed by the vote of five judges (Judges Ross, Fagg and Wollman join in this opinion; Judge Arnold concurs in the result; Chief Judge Lay, joined by Judges Heaney and McMillian, dissents).

The interdistrict findings and conclusion on the housing issues are affirmed by an equally divided court (Judges Ross, Fagg and Wollman join in this opinion; Judge Arnold files a concurring and dissenting opinion in which he concludes that the case should be remanded to the district court to consider whether there are interdistrict housing

2. The named student plaintiffs were replaced at various times during the litigation. In February 1985, the court certified the class of present and future KCMSD students.

violations which would require relief; Chief Judge Lay, joined by Judges Heaney and McMillian, dissents).

The dismissal of the SSDs and HUD at the close of the plaintiff's evidence is therefore affirmed.

The intradistrict remedy ordered against the State of Missouri and KCMSD is modified in some respects with five judges concurring (Judges Ross, Fagg and Wollman join in the opinion and Judge Arnold concurs in the result; Chief Judge Lay, joined by Judges Heaney and McMillian, dissents).

This suit was filed in 1977 by the KCMSD, the School Board, and four children of two School Board members. The complaint alleged that the State, surrounding school districts in Missouri and Kansas, and several federal agencies including HUD[3] had helped cause or had been part of a system of racial segregation among Kansas City metropolitan area school districts. In October 1978, the district court dismissed the Kansas defendants for want of jurisdiction. It also concluded that the KCMSD lacked standing to bring an action against the State as party plaintiff and realigned the KCMSD as a defendant. *School District of Kansas City, Missouri v. Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978).[4]

3. The named defendants included the State of Missouri, the Missouri State Board of Education and various Missouri officials, the State of Kansas, the Kansas State Board of Education and various Kansas officials, several Kansas school districts in the Kansas City metropolitan area twelve Missouri school districts in the area, the United States Departments of Transportation (DOT), Health, Education, and Welfare (HEW), and Housing and Urban Development (HUD).

4. These rulings were certified under 28 U.S.C. § 1292(b) for interlocutory review. 460 F. Supp. at 445. An appeal, taken by the KCMSD and the North Kansas City School District, was denied by this court. KCMSD thereafter filed an appeal under 28 U.S.C. § 1291 which was dismissed. *See School District of Kansas City, Missouri v. Missouri*, 592 F.2d 493 (8th Cir. 1979).

In May 1979, an amended complaint was filed against KCMSD, and the federal and Missouri defendants named in the original complaint. The amended complaint made two distinct allegations: first, of an interdistrict violation, committed by the SSDs, and the State and federal defendants; and second, of an intradistrict violation within the KCMSD, committed by the KCMSD and the State defendants. KCMSD pursued its claim by filing, in July 1979, a cross-claim against the State, reiterating the allegation of interdistrict violation made by the Jenkins class, and seeking indemnification against any intradistrict liability.

Trial to the court commenced October 31, 1983.[5] Over the course of 64 trial days, plaintiff called over 140 witnesses, offered 2,100 exhibits, and designated approximately 10,000 pages of depositions. Before hearing evidence in response, the district court, based on standards set out by the Supreme Court in *Milliken v. Bradley,* 418 U.S. 717 (1974), dismissed the eleven SSDs from the case under Fed. R. Civ. P. 41(b).[6] The court found that school districts in Missouri are autonomous and that none of the districts had committed any acts with intent to discriminate on the basis of race, to contain blacks in the KCMSD, or bar blacks from the SSDs. The court further found that within four years after *Brown v. Board of Education,* 347 U.S. 483 (1954) (*Brown I*), and in most cases within

5. Before trial, the DOT and one of the SSDs, the Raymore-Peculiar School District, were dismissed voluntarily. *See* Order of June 5, 1984 at 2.

6. The eleven districts dismissed were the Blue Springs, Center, Fort Osage, Grandview, Hickman Mills, Independence, Lee's Summit, Liberty, North Kansas City, Park Hill, and Raytown School Districts. HEW subsequently was dismissed for plaintiffs' failure to prove that the agency acted with racial animus or abused its discretion in the enforcement of Title VI. *See* Order of July 16, 1984.

a shorter time, all the SSDs had eradicated the vestiges of their dual school systems and were operating unitary systems. The court further found that none of the alleged discriminatory actions committed by the State or the federal defendants had caused any significant current interdistrict segregation. The district court therefore denied interdistrict relief. *See generally* Order of June 5, 1984.

The district court then heard additional evidence and, on September 17, 1984, issued its order holding the State and the KCMSD liable for racial segregation of students within the KCMSD. *Jenkins v. Missouri,* 593 F. Supp. 1485 (W.D. Mo. 1984). The court observed that before 1954, the State and the KCMSD had maintained a racially segregated dual school system. The court found, in the existence of twenty-four KCMSD schools with a black enrollment in excess of 90%, and in other areas, vestiges of the now unlawful dual school system. It therefore held that the State and the KCMSD, under principles announced by the Supreme Court in *Brown v. Board of Education,* 349 U.S. 294, 301 (1955) (*Brown II*), had failed in their affirmative duty to dismantle the unconstitutional pre-1954 system. The court also held that HUD was not liable, finding that HUD had followed a balanced approach to sponsoring subsidized housing projects in both innercity and suburban areas.

On June 14, 1985, after a two-week hearing on the scope of appropriate relief, the court issued a remedial order requiring the State and the KCMSD to fund compensatory and remedial educational programs and necessary capital improvements in KCMSD schools. The plan is projected to cost $87,000,000 over the next three years, with the State bearing approximately $67,000,000 and the KCMSD approximately $20,000,000. *See* Memorandum Opinion of June 14, 1985 at 41-42.

In this appeal the Jenkins class challenges the district court's dismissal of HUD, and joined by KCMSD, its dismissal of the SSDs, and its denial of interdistrict relief. The KCMSD also challenges the district court's realignment of the KCMSD as a party defendant. The State challenges the scope of the district court's remedy and the allocation of costs.

INTERDISTRICT LIABILITY FINDINGS

In *Milliken*, 418 U.S. 717, the Supreme Court held that an interdistrict remedy may not be imposed absent a finding of a constitutional violation within one district producing a significant segregative effect in another school district. *Id.* at 744-45. Without an interdistrict violation and interdistrict effect, there is no constitutional wrong requiring an interdistrict remedy. *Id.* Plaintiffs advanced to the district court three theories to support their claim of interdistrict violation and effect, requiring the imposision of an interdistrict remedy in the form of consolidation of the KCMSD and SSDs:

> [F]irst, that the SSDs, as agents of the state, were guilty of operating a regional system of segregated schools that centered on and impacted Kansas City with blacks and made the suburbs whiter before 1954; second, that the SSDs failed in their affirmative duty to eliminate the vestiges of the dual school system; and third, that the SSDs are liable for the effects of actions by the KCMSD and other defendants and can therefore be included in an interdistrict remedy.

Order of June 5, 1984 at 5. The district court found, based on the *Milliken* holding, that there was lack of proof of discriminatory intent in the establishment or change of

any school district boundary and thus distinguished the interdistrict cases upon which the plaintiffs relied. It rejected the arguments that the SSDs were not separate and autonomous but were instead agents of the State. It further rejected the argument that, as agents and subdivisions of the State, the SSDs must be included in an interdistrict remedy absent any finding that they had committed specific violations by their own initiative.

The court examined the plaintiffs' argument that the pre-1954 dual school systems had caused racial segregation in the Kansas City metropolitan area. The court acknowledged the substantial increase in the KCMSD black population from 1910 to 1960, but found that the increase resulted principally from the unusual economic and employment ramifications of the World Wars and intervening Depression. Order of June 5, 1984 at 17. The absence of black schools in the SSDs, it found, had not discouraged black families outside or within Missouri from moving to and living in those districts. The district court also rejected the argument that within the SSDs any vestiges or significant effects of the pre-1954 dual school system remained. The acts thirty years past, the court found, had negligible current effects. While some of the SSDs had dual school systems in the pre-1954 era and some did not,[7] after *Brown I* each had disestablished its pre-1954 school system with deliberate speed and all vestiges of those systems have long since disappeared. The district court entered separate findings with respect to each SSD. It found that all were unitary, most by 1955, in immediate compliance with the mandate of *Brown I*, two more by

---

7. The court specifically found that Independence, Lee's Summit, Liberty, North Kansas City, and Park Hill had earlier maintained dual school systems, but the other districts had not. *Id.* at 43-95

the 1957-58 school year, and the last, Park Hill, was fully integrated by the 1959-60 school year. *Id.* at 43-95.

The court then considered the plaintiffs' second theory, that the SSDs had failed in their duty, pursuant to the mandate of *Brown II,* to eliminate vestiges. The district court found that the establishment of an association of regional school districts did not negate the autonomy of the individual SSDs, and that the sharing of sales tax revenues by certain of the SSDs whose area may have been partly within the Kansas City, Missouri, city limits did not amount to a constitutional violation. *Id.* at 19-21. Further, a juvenile home, local special and vocational education programs, and particularly the creation of certain vocational education districts were examined and found not to have been constitutional violations on the part of the SSDs. *Id.* at 21-26. The district court also examined a statute enacted by the Missouri General Assembly in 1957 enlarging the size of a city that should constitute a single school district.[8] The court found that the enactment was not driven by an intent to concentrate black students within KCMSD, and therefore, was not an intentional interdistrict violation. *Id.* at 28-29. The court also examined the SSDs' response to recommendations of the Spainhower School District Commission of 1979, regarding realignment of boundaries so as to create some twenty school districts in the state, and with respect to financing and local control, and found no evidence that any of the SSDs rejected or declined to consider these proposals for rea-

8. H.B. 171 increased from 500,000 to 700,000 the size of a city that should constitute a single school district. In the 1960 census, the population of Kansas City did not exceed 500,000. The court found that significant annexations in eastern and southern Jackson and Clay Counties occurred after the bill was enacted and that KCMSD had annexed several all-white schools from 1955 to 1973.

sons at all related to race. It further rejected arguments based upon employment practices in the SSDs.

The district court finally analyzed in detail plaintiffs' third theory, that the SSDs may be included in an interdistrict remedy because the effects of others' discriminatory acts were felt within the SSDs. It found no evidence that white families had been lured to or black families discouraged from living in the SSDs. Nor did any of the factual evidence concerning housing implicate any of the SSD defendants. *Id.* at 34-35. The steady increase in black enrollment in the SSDs since 1968, particularly in Raytown, Hickman Mills, Center and Grandview districts,[9] and the fact that in 1980, 23,434 blacks resided outside the principal contiguous area was found to refute the testimony of plaintiffs' experts. The court rejected white-flight theory as a constitutional violation by the SSDs. *Id.* at 36-39.

The district court also addressed plaintiffs' claims regarding housing violations. While the court found that before 1948, in several areas within the SSDs restrictive covenants were enforced, the court further found that such enforcement did not have a current significant segregative effect.[10] With respect to public housing, it found that such housing is available in significant amounts within every SSD and that the HUD section 8 program is available in all parts of the metropolitan area. No testimony linked any SSD to the transition of neighborhoods within the KCMSD from white to black and the accompanying white flight which had taken place in Kansas City since 1940. *Id.* at 41.

9. In 1982 the Center district had an enrollment of 10.6% black, Grandview 9.8%, Hickman Mills 16.7%, and Raytown 7.6%. *Id.* at 41-42.

10. See Note 22, *infra.*

The court therefore concluded that there was no interdistrict violation and interdistrict effect. Thus, as required by *Milliken*, interdistrict relief was denied. *Id.* at 95. The court stressed that awarding relief " 'would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.' " *Id.* at 96 (quoting *Milliken*, 418 U.S. at 746). It rejected a cumulative effect and found plaintiffs' evidence de minimis at most and legally insufficient to justify the relief sought against the SSDs. *Id.* at 97-98. The court thus dismissed the case against the SSDs.

INTRADISTRICT LIABILITY FINDINGS

The district court then tried the intradistrict issues and found that the inferior education indigenous to the State-compelled dual school system has lingering effects in the KCMSD. *Jenkins v. Missouri*, 593 F. Supp. at 1492. The district court recognized the stipulation that before 1977 KCMSD was not unitary and did not comply with federal regulations. *Id.* at 1489. KCMSD was majority white in enrollment until 1970 and could have achieved mathematical racial balance in its schools. *Id.* at 1492. Instead, it chose to operate some completely segregated schools and other integrated ones. In 1974, twenty years after *Brown I*, 39 schools were more than 90% black; another 38 had 10% to 90% black enrollment. Eighty percent of all blacks in the district attended schools that were 90% black. Only 19% of the blacks attended a school that was 10% to 90% black. *Id.* at 1492-93. As of 1977, 25 one-race schools under the pre-1954 system remained 90% or more of the same race. *Id.* In addition, four schools that were black under the dual system were predominantly

black when closed in 1968. *Id.* at 1492. In the 1983-84 school year no KCMSD school had less than 30% black enrollment, but 24 schools were racially isolated at more than 90% black. *Id.* at 1493.

The court found that the KCMSD still has not entirely dismantled the dual school system. The court then made particular findings on the liberal transfer policy, the neighborhood school policy, and attendance zones, and found that these, rather than facilitating integration, fostered the maintenance of segregated attendance patterns. Intact busing was found to have been segregative in intent and effect, but, as it was stopped in the 1960's, no continuing violation existed. The court found that plans had not been adopted for district-wide desegregation until 1977-78. *Id.* at 1493-94.

Similarly, the court imposed liability on the State based on its intentional creation of the dual school system and the obligation that existed to disestablish such a system.[11] As vestiges of the State's dual school system lingered in KCMSD, the obligations of KCMSD and the State had not been met. The court rejected the State's argument that constraints imposed by the state constitution or statutes prevented its affirmative disestablishment of the dual school system. It held the issues in favor of the Jenkins class and against KCMSD and the State and held the issues in favor of KCMSD and against the State on the cross-claim. *Id.* at 1505.

---

11. While the court conceded that the State may have through its actions created an atmosphere in which private white individuals and members of the real estate, banking, and insurance communities could justify bias against blacks it found no evidence that the State significantly encouraged such practices. 593 F. Supp. at 1501-03. The court also found that freeway placement did not amount to a constitutional violation.

LIABILITY OF HUD

With respect to the claim against HUD, the court examined Federal Housing Administration appraisal practices before 1949, cooperative agreements with the City of Kansas City under the auspices of the Housing Authority of Kansas City (HAKC) and the Land Clearance for Redevelopment Authority (LCRA), and section 8 certificates. It found that HUD followed a balanced housing policy and attempted to insure that assisted housing was located in both innercity and suburban areas. There was no evidence that HUD's site selection and approval practices for federally subsidized multi-family housing substantially affected the racial composition of schools within KCMSD. *Id.* at 1499. The court pointed to HUD's affirmative marketing efforts to apprise participating section 8 certificate-holders that affordable housing was available throughout the entire community. *Id.* at 1500. There was no evidence that HUD routinely denied blacks FHA mortgages, that it discriminatorily foreclosed on mortgages held by blacks, or that it avoided selling the homes on which its insured mortgages had been foreclosed to blacks. Further, there was no evidence that neglect of HUD-held homes was racially discriminatory in intent or purpose. The issues were held in favor of HUD.

I.

We have had earlier occasion to deal with the legal standards governing interdistrict school desegregation cases. *See, e.g., Little Rock School District v. Pulaski County Special School District No. 1*, 778 F.2d 404 (8th Cir. 1985); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*,

105 S. Ct. 82 (1984).[12] We draw our basic guidance from the Supreme Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974):

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

418 U.S. 744-45 (citations omitted).

Two courts of appeals have read this language to require clear proof of cause and effect of a constitutional vio-

---

12. In *Little Rock* this court rejected the consolidation remedy but ordered adjustment of the boundaries between the districts, a voluntary intradistrict or interdistrict transfer system, the exploration of magnet or special school or programs and consideration of cooperative programs. 778 F.2d at 435-36. In *Liddell* we approved a settlement providing for intradistrict relief, a voluntary transfer program between cities and suburban schools and a magnet school program.

lation, and a careful delineation of the extent of the effect, before an interdistrict remedy may be invoked. *Goldsboro City Board of Education v. Wayne County Board of Education*, 745 F.2d 324, 332 (4th Cir. 1984); *Lee v. Lee County Board of Education*, 639 F.2d 1243, 1256 (5th Cir. 1981). As the Fifth Circuit stated in *Lee*:

> We believe the Court's deliberate choice of phrases such as "substantial" or "direct cause" and "significant segregative effect" also expresses an insistence that in cases where an interdistrict remedy is requested, there must be clear proof of cause and effect and a careful delineation of the extent of the effect. In the absence of such a showing, school district lines are to be carefully observed and desegregation remedies confined to orders affecting the school district in which the condition of segregation is manifest.

Id. at 1256.

In addition to "clear proof" of the interdistrict violation and its interdistrict effect and "a careful delineation" of the extent of the interdistrict effects, it must be shown that the interdistrict segregative effects are current. *Lee*, 639 F.2d at 1260. Federal courts may not invoke their equitable power to fashion a remedy to correct a condition unless it currently offends the Constitution. As the Court stated in *Milliken*: "A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'" *Id.* at 738 (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971)); *see also General Building Contractors v. Pennsylvania*, 458 U.S. 375, 399 (1982) (a remedial decree should "extend no farther than required by the nature and the extent of that violation").

II.

We must also recognize at the outset the importance of the district court's factual findings in school desegregation cases. As we stated in *Little Rock*:

> We will not reverse the district court's factual findings with respect to liability unless we conclude that they are clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 105 S. Ct. 1504 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-90 (1982); *Dayton II*, 443 U.S. at 534 n.8; *Columbus Board of Education v. Penick*, 443 U.S. at 468-71 (concurring opinions of Burger, C.J., and Stewart, J.); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1978). Nor will we reverse such findings when they are based on inferences from other facts unless the rigorous standards of the same rule are met. *Anderson*, 105 S. Ct. at 1511. The Supreme Court has emphasized the importance of the clearly erroneous rule in civil rights cases, *see, e.g., Pullman-Standard v. Swint*, 456 U.S. at 287-90, and, more particularly, in school desegregation cases:
>
> > The elimination of the more conspicuous forms of governmentally ordained racial segregation * * * counsels undiminished deference to the factual adjudications of the federal trial judges in cases such as these, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit.
>
> *Columbus Board of Education v. Penick*, 443 U.S. at 449, 471 (1979) (Stewart. J., concurring, with whom Burger, C.J., joins, concurring).

Little Rock, 778 F.2d at 410-11. *See Morrilton School District No. 32 v. United States*, 606 F.2d 222, 230 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); *see also Riddick v. School Board of the City of Norfolk*, 784 F.2d 521, 533 (4th Cir. 1986) (factual findings by a district court in school desegregation cases are entitled to great deference on review "especially where the presiding judicial officer has lived with a case for many years").

The Supreme Court in *Anderson v. City of Bessemer City*, 105 S. Ct. 1504 (1985), has explained that the trial judge's role is to determine fact, and duplication of these efforts in the courts of appeals "would very likely contribute only negligibly to the accuracy of fact determination." *Id.* at 1512. The Court stated:

> The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 1511-12.

Chief Judge Lay's dissent,[13] in violation of the teachings of *Anderson*, duplicates the role of the district court and is an exercise in appellate factfinding. A reading of the dissent is sufficient to demonstrate the rejection of the district court's carefully weighed findings of fact and substitution of those more desirable, frequently based on evidence considered and rejected by the district court.[14] While on some occasions placing the mantle of the clearly erroneous rule about the discussion, it is evident that Chief Judge Lay was engaging in an original evaluation of the voluminous and ofttimes contradictory record seeking an ultimate conclusion more satisfactory than that reached by the district court. This is directly contrary to the mandate of *Anderson*.

---

13. Chief Judge Lay's dissent, in contrasting facts to rhetoric "doth protest too much." W. Shakespeare, Hamlet, Act III, sc. ii, line 242. The language, on its first page particularly, is exaggerated, without support in the record. The "extravagant language" (*see Milliken*, Stewart, J., concurring, 418 U.S. 753), requires this rejoinder.

14. We need point to only a few examples. "The record is replete with evidence of constitutional violations by many of the SSDs and of the effect those violations had on all of the SSDs and on the KCMSD." Chief Judge Lay's dissent at 94. In discussing the rejection of the evidence of Dr. James D. Anderson, plaintiff's expert historian which the district court discussed in detail in the June 5, 1985 Order, *id.* at 15-16, 18, Chief Judge Lay states: "This evidence was highly probative and it was wholly arbitrary for the court to reject it and inject its own inferences. Moreover, I believe it is especially crucial in a case of this nature to give great consideration to the testimony of historial experts where the theory to be proved occurred long ago and few witnesses are alive to testify." Chief Judge Lay's dissent at 103, n.17. The increase in black enrollment in the SSDs since *Brown* "is conclusive evidence that the lack of schools for blacks in the SSDs prior to 1954 was a deterrent to blacks settling there. * * * It is clear that the SSDs as well as the state and KCMSD, have all failed to fulfill their affirmative duty under *Brown v. Board of Ed.* to eliminate the vestiges of their prior segregative policies and that significant interdistrict effects of these policies are still evident in the Kansas City metropolitan area." *Id.* at 106. "Here the racial imbalance is clear evidence of continuing segregation following a pre-1954 de jure policy." *Id.* at 109.

III.

The Jenkins class does not challenge the findings of the district court. Rather, it argues that the findings establish continuing interlocking, interdistrict violations whose cross-district nature and metropolitan-wide scope require relief encompassing the SSDs. It argues particularly that there is an interdistrict violation or effect under *Milliken* and *Hills v. Gautreaux*, 425 U.S. 284 (1976), and points to several independent bases for interdistrict relief. These are: the pre-1954 interdistrict system of locating dual schools; the State's and the SSDs continuing interdistrict violations; KCMSD's officially sanctioned suburban flight violation; the State's market-wide dual housing systems; and LCRA and HAKC's racial steering and siting violations.

The Jenkins class further argues that the district court denied interdistrict relief based on a "concatenation of legal error" as to interdistrict liability. It argues that in six respects the district court abandoned controlling legal principles in concluding that: the existence of dual schools before 1954 does not now amount to a constitutional violation; the SSDs were autonomous and independent; the SSDs were absolved of liability for their pre-1954 violations and erroneously ignoring the post-1954 segregative acts and omissions; without a finding of fault, the SSDs may not be required to take part in eliminating the effects on children in their districts of the State's metropolitan-wide dual school and housing violations; the SSDs did not invidiously entice white families to move into their district, and that unconstitutional actions within one district making it blacker which reciprocally affects adjacent districts by making them whiter may not provide an independent basis for interdistrict relief; and absent intentional

segregative acts by each school board sought to be included, a finding of liability against actors in the housing market is irrelevant to the SSDs. The housing argument will be discussed separately in IV and V.

Finally, the Jenkins class argues that the district court applied an improper burden and standard of proof of significant effects in an improperly piecemeal fashion. It further argues that the district court improperly fragmented the evidence of unconstitutional acts rather than evaluating the evidence as a whole. It argues that the district court's finding of six distinct metropolitan-wide constitutional violations satisfies *Milliken's* significant segregative effect standard. It urges under *Swann* that proof of a system with a history of segregation warrants a presumption against schools that remain disproportionate in their racial composition. It argues that the proof acknowledged by the court, of prior de jure segregation on an area-wide basis, coupled with a patently continuing racial imbalance among the SSDs' student and faculty compositions, established the liability of the SSDs. It further argues that the district court improperly rejected much of the evidence, and improperly barred the presentation of quantitative evidence, as irrelevant.

The broad scope of these arguments is considerably narrowed when viewed in light of significant factual findings of the district court. These findings are not challenged as clearly erroneous. The district court found that the SSDs were autonomous and locally controlled,[15] and

---

15. The district court pointed to evidence that the SSDs are governed by local boards elected by the voters, hire the superintendents and teachers, by vote establish their own tax levy, have plenary power to establish school attendance zones, and determine whether to provide transportation for their students.

(Continued on following page)

that the State was powerless to require a merger or consolidation.

The district court recognized the stipulation that before 1954 the State mandated dual school systems and mandated SSDs' compliance in maintaining dual systems. It found that all SSDs met their constitutional obligation to operate a unitary school system within a maximum of four years after *Brown I*, most of them doing so within one year. The dismantling of the dual system was accomplished with all deliberate speed. Order of June 5, 1984 at 99. It specifically found that the evidence established that there was no barrier to movement of blacks into the SSDs. *Id.* at 39. It found the pre-*Brown* acts thirty years past to have negligible present effects. It further found that the faculty and staff composition of the SSDs do not affect the racial composition of the student bodies. The court found the faculty were hired and promoted on a racially neutral basis. The court could not conclude that there was an interdistrict violation from any possible intradistrict factors.

The factual argument based on the pre-*Brown* interdistrict system of locating dual schools flies in the face of the district court's finding that the pre-*Brown* acts have negligible present effects. Chief Judge Lay's dissent suffers from a similar infirmity as the district court made numerous findings interspersed through its order concerning the negligible and de minimis nature of any such

---

Footnote continued—

Reorganization is a decision to be made by the local school districts, and the state constitution prohibits legislative enactment of special laws to change the boundaries of any school district. The district court further found that there was no discriminatory intent in the establishment or maintenance of the boundary lines between the school districts. Order of June 5, 1984 at 10-11.

effects. These findings are not clearly erroneous.[16] These findings make unnecessary a detailed recitation of the pre-1954 evidence.

---

16. The district court in its June 5, 1984 Order made the following findings: The evidence that segregated schools existing before 1954 were the direct and substantial cause of blacks leaving each SSD, and that such had a significant segregative effect in the KCMSD "was weak, speculative and in any event *de minimis*." *See* Order of June 5, 1984 at 12. Plaintiff's argument that the state through its agents, the SSDs, maintained a regional black interdistrict school system causing blacks to leave the SSDs and migrate to Kansas City in search of an education is not supported by the law or the evidence. *Id.* at 15. Assuming the entire population decrease in the three county area was caused by people leaving and going to Kansas City because of the dual school system, it found "the impact of that movement on the KCMSD enumeration insignificant." *Id.* at 16. The motivation for blacks leaving the three county area and moving to Kansas City "resulting from segregated schools was *de minimis* and insignificant" when compared with other primary motivating factors transferring blacks to the KCMSD under the segregated school system "is not a cause of the present racial distribution of the population in the three county area." *Id.* at 18. The Jenkins class did not persuade the court "that any vestiges or significant effects of the pre-1954 dual school system remain" in any of the SSDs. *Id.* at 18. "At most plaintiff's evidence is only *de minimis* and is therefore legally insufficient to justify the relief sought against the suburban school district defendants." *Id.* at 98. The district court summarized:

> Another factor negating the importance of plaintiffs' voluminous pre-1954 evidence is simply its age. Our society is dynamic; myriad factors produce a multitude of simultaneous decisions and consequent effects. If it were a stagnant entity, the pernicious effects of de jure segregation would be obvious. Due to its fluid nature, however, acts now 30 years past have negligible present effects. Such is the fate of the discriminatory practices plaintiffs took months to develop. Too many events have intervened, reshaping earlier actions. *Lee v. Lee County, supra,* 639 F.2d at 1259.

Id. at 98-99. In concluding, the district court stated "even if the court were to view plaintiff's evidence liberally, which under Rule 41(b), it is not required to do, the violations proved are at most, *de minimis* and far removed in time." *Id.* at 105.

Chief Judge Lay's dissent does not establish what the Jenkins class and KCMSD did not argue, that these findings of fact are clearly erroneous.

The argument that the State and SSDs participated in continuing interdistrict violations is contrary to the district court's finding that the SSDs had met their constitutional obligation to operate unitary school systems within four years after *Brown I*, most of them doing so within a year. Similarly, the argument that KCMSD officially sanctioned suburban flight looks first to KCMSD's violation which the district court clearly found to be only intradistrict in nature. The argument based on flight into neighboring SSDs making the southeast area schools blacker and recipient SSD schools whiter, thereby causing racial segregation in adjacent districts, is contrary to the district court's finding that there was no barrier of movement to blacks to the SSDs. The district court specifically found that there was considerable increase in the black enrollment of the SSDs, particularly Center, Grandview, Hickman Mills, and Raytown.

Similarly, in the enumeration of six legal errors, three are based upon pre-1954 actions of the SSDs. The district court's findings that these acts have negligible present effect fundamentally undermines the validity of these arguments. As we have seen, the argument based on the actions of KCMSD and white flight run contrary to the factual findings mentioned above.

So also, the argument that the SSDs, though not at fault, would still be liable to take part in eliminating the effects on children in their districts of the State's metropolitan-wide dual school violations, suffers from two fatal deficiencies. It ignores the lack of finding of any such effects, and is contrary to the district court's findings that within at most four years after *Brown I*, any vestiges of the dual school systems that may have existed in the SSDs had been eliminated.

The Jenkins class further argues that *Swann* raises a presumption against schools that are disproportionate in their racial composition. The district court did not err in rejecting the *Swann* presumption. *Milliken* was careful to point out that disparity in the racial composition of pupils within a single district merely signals an inquiry into the causes for pronounced racial identifiability of schools within one school system. The *Milliken* limitation of this presumption is the subject of comment by the Fifth Circuit in *Lee v. Lee County Board of Education*, where the court stated:

> It seems important to note also that *Milliken*, unlike *Swann* and *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), did not sanction the use of any presumptions on the question of the cause of interdistrict segregation. Thus, while *Swann*, as noted above, permits an inference that the continued existence of one-race schools in a system that formerly practiced de jure segregation is a vestige of such segregation, and *Keyes* permits one to infer the existence of systemwide de jure segregation from proof that school authorities have pursued an intentional policy of segregation in a substantial portion of a school district, *Milliken* refused to sanction a presumption that significant disparities in the racial composition of autonomous school districts resulted from impermissible action by those districts and thus justified imposing upon them the burden of remedying conditions of segregation existing in other districts. The *Milliken* Court noted that both *Keyes* and *Swann* merely involved "the use of a significant racial imbalance in schools within an autonomous school district as a signal which operates to shift the burden of proof [which] is a very different matter from equating

racial imbalance with a constitutional violation calling for a remedy." 418 U.S. at 741 n.19 * * *.

639 F.2d at 1254.

Contrary to the argument of the Jenkins class, cases of this court do not adopt the *Swann* presumption in interdistrict cases. *See Morrilton School District No. 32 v. United States*, 606 F.2d at 230; *see also United States v. Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 451 (1975); *Haney v. County Board of Education*, 410 F.2d 920 (8th Cir. 1969). They simply recognize that racial gerrymandering, which the district court specifically found is absent here, will make school authorities responsible for the foreseeable effects. So also, the argument concerning the presumption runs directly contrary to the teachings of *Washington v. Davis*, 426 U.S. 229, 240 (1976), that there must be a showing in a school desegregation case of "a current condition of segregation" resulting from intentional state action. The district court's finding that the SSDs were autonomous prevents a conclusion that there is a single system to which such a presumption applies.

The arguments of the Jenkins class run contrary to the facts found by the district court.[17] In essence, in the detailed recitation of evidence, it seeks to have this court substitute its judgment for that of the district court. This is contrary to the general rule of *Anderson v. City of*

17. Chief Judge Lay's dissent also argues that a recent order of the district court made some nine months after the argument of this case illustrates that the refusal to grant interdistrict relief was clearly erroneous and contradictory to its own findings. We cannot read the general statement in the recent order to have the effect of setting aside carefully detailed findings of facts and conclusions in its 105 page June 5 Order, its 21 page order on intradistrict liability, or its 45 page order on remedy.

Bessemer City, supra, and to the specific dictate of this court that we give "undiminished deference to the factual adjudications of federal trial judges in cases such as these, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit." *Little Rock*, 778 F.2d at 410-11.

IV.

We next consider arguments advanced by the Jenkins class that racially discriminatory acts by the State in housing-related areas justified interdistrict relief involving the SSDs. Before considering the district court's findings on this matter, we must address the class' argument that the district court misread *Milliken* in deciding whether the SSDs could be required to participate in an interdistrict remedy. In doing so, we must read all of *Milliken* and all of the district court's order. According to the class, the district court read *Milliken* as holding that each SSD could not be required to participate in an interdistrict remedy absent a finding that that SSD had engaged in racially discriminatory conduct.

The passage from *Milliken* set forth above in Part I, *supra*, made plain that, before a federal court may impose an interdistrict remedy, "it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district." 418 U.S. at 744-45. Specifically, the court must find that racially discriminatory acts "have been a substantial cause of interdistrict segregation." *Id.* at 745. Absent this showing, "there is no constitutional wrong calling for an interdistrict remedy." *Id.* On the facts before it, the Court was forced to conclude in *Milliken* that:

> With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.

Id.

The Court's decision in *Hills v. Gautreaux*, 425 U.S. 284, two years later, forcefully emphasized this central holding of *Milliken*. Justice Stewart wrote for the Court:

> Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." * * * *In Milliken, there was no finding of unconstitutional action on the part of the suburban school officials and no demonstration that the violations committed in the operation of the Detroit school system had had any significant segregative effects in the suburbs.* * * * The desegregation order in *Milliken* requiring the consolidation of local school districts in the Detroit metropolitan area thus *constituted direct federal judicial interference with local governmental entities without the necessary predicate of a constitutional violation by those entities or of the identification within them of any significant segregative effects resulting from the Detroit school officials' unconstitutional conduct.* Under these circumstances, the Court held that the interdistrict decree

> was impermissible because it was not commensurate with the constitutional violation to be repaired.

Id. at 293-94 (emphasis added) (citations omitted); *see also Goldsboro City Board of Education v. Wayne County Board of Education*, 745 F.2d at 328 ("An independent school district which has not caused segregation in a neighboring independent district has no duty to rectify a racial imbalance in the other districts.").

Milliken and *Hills* make clear that we may grant interdistrict relief only to remedy a constitutional violation committed by the SSD, or to remedy an interdistrict effect in the SSD caused by a constitutional violation in KCMSD. The district court first carefully considered whether the SSDs had violated the Constitution. It found they had not. Indeed, the district court concluded that to award relief in this case would, as the Court concluded in *Milliken*, "impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy." 418 U.S. at 745. Order of June 5, 1984 at 96. It further found that the Jenkins class had not established any acts or omissions by the SSDs "which have had a substantial segregative impact in any other district."[18] The district court was compelled to make this inquiry by *Milliken* and *Hills*, stressing as they do the significance of the commission of a constitutional violation. The court's consideration of the appropriateness of interdistrict relief would have been incomplete without this inquiry. *Milliken* makes plain that the issue of whether the parties are constitutional violators must be considered as well as the issue of whether there is a constitutional violation in one district causing a significant segregative effect in a neighboring district.

---

18. See Note 16, *supra*.

Moreover, contrary to the argument of the class that the court looked only to the culpability of the SSDs, the scope of the order is far broader. The court's order admittedly emphasizes the absence of culpability of the suburban districts. However, the court explicitly recognized that under *Milliken* "there must be evidence of a constitutional violation in one district that produces a significant segregative effect in another district." Order of June 5, 1984 at 14, 95. The district court compared the theories before it with those in *Milliken*. It noted that only the schools in one district were affected and that the remedy must be limited to that system. In examining the cause and effect issue, the court noted that "not only is plaintiff's evidence here blurred as to cause and effect, there is no 'careful delineation of the extent of the effect.'" *Id.* at 96 (quoting *Lee*, 639 F.2d at 1256). The district court thus dealt not only with the issue of whether the SSDs were constitutional violators but also whether there were significant interdistrict segregative effects. *See* V, *infra*. When it did so, it made specific findings that negate current significant interdistrict effects, and concluded that the requirements of *Milliken* had not been met.

In *Bell v. Board of Education*, 683 F.2d 963 (6th Cir. 1982), the Sixth Circuit suggested a number of practical problems in attempting to order school districts to remedy housing violations:

> We do not find any case addressing the argument that a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies. We decline to accept this argument. Under this argument the discriminatory conduct of the FHA in making housing loans and local housing authorities in the construction and rental of public housing is attributable to school boards. Such a proposal places too heavy a burden on the schools to remedy wrongs for which they are no more or less responsible than the plaintiffs, the courts, the churches, the Congress or other institutions. Plaintiffs do not suggest how the schools, after a finding of liability, would go about remedying this problem or what kind of order a federal court could enter that might as a practical matter have a chance of changing the fact that black and white families live in separate neighborhoods in most towns and cities.

Id. at 968 (footnote omitted).

The Supreme Court has given consistent admonition in *Hills* and *Milliken* that federal courts may not "restructur[e] the operation of local governmental entities that were not implicated in any constitutional violation." 425 U.S. at 279. The district court's findings amply establish that the SSDs were not "implicated" in the State's housing violations. *See* Part V.

We have considered that culpability is an important factor in interdistrict analysis. In *Little Rock*, 778 F.2d 404, we ordered that the boundaries of the North Little Rock School District remain intact "in partial recognition of the fact that the nature and extent of its interdistrict violations are less severe than those of the other defendants." *Id.* at 435. Judge Arnold's separate concurring and dissenting opinion recognizes that the remedy to be imposed against the SSDs must be "limited by the fact that the SSD is not itself a constitutional violator." *Post* at 75.

We recognize that *Morrilton School District No. 32 v. United States*, 606 F.2d 222, states that school districts may

be required to participate in a remedy when "there was no evidence implicating them in a direct way with the establishment" of the segregated district. *Id.* at 228. *Morrilton* is a gerrymandering case. Its broad language must be limited to its facts, an interdistrict violation in the consolidation of school districts, with the effects felt in each.[19] An attempt to imbue *Morrilton* with broader force disregards not only its salient facts, but also the Seventh Circuit precedent it quotes: "If the state has contributed to the separation of the races, it has the obligation to remedy the

---

19. *Milliken* makes clear that "an interdistrict remedy might be in order * * * where district lines have been deliberately drawn on the basis of race." 606 F.2d at 228 (quoting *Milliken*, 418 U.S. at 745). Unlike the present case, *Morrilton* contains findings that clearly fall within the *Milliken* language. We dealt in *Morrilton* with the consolidation of school districts in Conway County, Arkansas that created all all-black East Side District and a disproportionately white Morrilton District. The court stated:

> The violation here is clearly interdistrict in nature. East Side is almost entirely black and includes territory that would properly have been absorbed by the surrounding districts were it not for racial considerations. The boundaries of the East Side District, and consequently, the boundaries of the other school districts in Conway County, were not neutrally drawn. Thus, the prohibition in other cases * * * is not applicable here. Interdistrict relief is appropriate and necessary to remedy the constitutional violation.

Id. (citations omitted). The court continued:

> Here, the nature of the violation was the consolidation of school districts on the basis of race. * * * [T]he effects of that consolidation were manifested primarily in the boundaries and racial composition of the Morrilton, Plumerville and East Side Districts. East Side is almost all black, and Morrilton is disproportionately white.

Id. at 229.

Morrilton holds that the unconstitutional consolidation of school districts so as to create an all-black district leaving others disproportionately white may properly be remedied through interdistrict relief. To argue that *Morrilton* compels imposition of an interdistrict remedy on the innocent SSDs in this case ignores that it deals with racial gerrymandering.

constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation." *Morrilton*, 606 F.2d at 229 (quoting *United States v. Board of School Commissioners*, 573 F.2d 400, 410 (7th Cir.), *cert. denied sub nom. Bowen v. United States*, 439 U.S. 824 (1978)). Here the district court clearly found that the SSDs were autonomous, not mere instrumentalities of the State, and their boundaries not the product of any constitutional violation by the State. Despite plaintiffs' urging, the language of *Morrilton* is limited to its facts, and does not reach the issues we face today.

V.

The Jenkins class argues that a dual housing violation, fueled by State enforcement of racially restricted covenants and felt in virtually every other housing program in the three-county area touching lending, appraisal, and sales practices, effectively channelled black and white low-income families to separate communities. Such violation and effects, it argues, were interdistrict, and therefore require the interdistrict remedy of consolidation. The Jenkins class further argues that as part and parcel of the State's dual housing market violations, there were constitutional violations by the LCRA and HAKC, which diverted blacks exclusively to the black areas within the KCMSD.

The district court made a general finding that not only is the evidence "blurred as to the cause and effect, there was no 'careful delineation of the extent of the effect.'" Order of June 5, 1984 at 96. It made specific findings that negate the existence of significant inter-

district current effects in the SSDs.[20] As *Milliken* requires an interdistrict violation causing a significant segregative effect in another district, these findings pose an insuperable barrier to granting interdistrict relief.

The district court found that school district boundaries had not constrained black movement in any way, *id.* at 39, and no acts of the SSDs contained blacks in KCMSD or kept them out of the SSDs. *Id.* at 3. The absence of black schools in the defendant districts before *Brown* did not discourage black families from outside or within Missouri from moving to and living in those districts. *Id.* at 18. The district court found that there was steady increase in black enrollments in the SSDs since 1968, and in 1980, 23,434 blacks resided outside the principal contiguous area. *Id.* at 36-37. We have observed the increase in black enrollment in Hickman Mills, Center, Grandview, and Raytown. *See* note 9, *supra*.

The court found that the substantial increases in the KCMSD black population were in large part due to the unusual economic and employment ramifications of the World Wars and intervening Depression. *Id.* at 17. None of the SSDs were shown by the expert Dr. Tobin to have played any significant role in housing matters or to have exerted any control whatsoever over the private decisions people made about where to live. *Id.* at 37-38. The district court made numerous findings concerning housing choices, economics, and job opportunities. *Jenkins v. Missouri*, 593 F. Supp. at 1490. In rejecting the expert testimony of Dr. Kane, the court pointed to the importance of

20. The court also specifically found the converse. The district court found that no SSD had committed any constitutional violation that had interdistrict segregative effect in the KCMSD or any other district. Order of June 5, 1984 at 18-19, 45, 48, 51, 54, 59, 67, 74, 78, 83, 91, and 95.

job location, ethnic clustering, and personal preference. *Id.* at 1491. These findings demonstrate the importance of personal choice,[21] referred to by at least two courts as "voting with feet." *See Riddick*, 784 F.2d at 537; *Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1435 (5th Cir. 1983).

Regarding the existence of racially restrictive covenants, stressed by the Jenkins class and by Judge Arnold in his concurring and dissenting opinion, the district court made it plain that the restrictive covenants have no current effect in the SSDs. The district court found no evidence that the covenants were enforced by state courts following *Shelley v. Kraemer*, 334 U.S. 1 (1948). It recognized the tremendous housing growth in many suburban areas after 1948, when the covenants were a nullity. That blacks presently live in locations previously covered by restrictive covenants further undermines their significance. Order of June 5, 1984 at 39.[22]

21. The court observed that people move for a variety of reasons, including a desire to be with persons of the same race or religion. It specifically found that many blacks who moved to the suburbs did so to enjoy a middle class environment rather than an integrated environment. Order of June 5, 1984 at 35. A substantial number of black families moved to the SSDs during and after the 1960s, many from inside the KCMSD. *Id.* at 41-42. There was testimony that crime and city riots were factors in housing choices.

22. With respect to the various districts, the court found that Fort Osage had had no covenants, Order of June 5, 1984 at 51, that Grandview, Lee's Summit, and North Kansas City had very few covenants, *id.* at 53, 73, and 83, and that Independence and Liberty also had few such covenants. *Id.* at 66, 77. The district court found that the restrictive covenants had no effect in Blue Springs, *id.* at 44-45, and Park Hill, *id.* at 90. There was no evidence that covenants prevented blacks from moving into Independence, *id.* at 66, Lee's Summit, *id.* at 73, or Liberty, *id.* at 78, and there was no present effect of past practices in preventing movement into Center, *id.* at 48, Hickman Mills, *id.*

(Continued on following page)

These findings of the district court that we have outlined above deal with conditions or effects that would have been expected had there been an interdistrict effect in the SSDs flowing from housing violations committed by the State or other actors in KCMSD.

Judge Arnold's concurring and dissenting opinion argues, as does the Jenkins class, that *Evans v. Buchanan,* 393 F. Supp. 428 (D.C. Del.), *aff'd* 423 U.S. 963 (1975), and *United States v. Board of School Commissioners,* 637 F.2d 1101 (7th Cir.), *cert. denied,* 449 U.S. 838 (1980), both approved interdistrict remedies based in part upon housing discrimination practiced by state actors. *Post* at 65.[23] In *Evans,* the district court found that governmental authorities had provided public housing almost exclusively within the confines of Wilmington and restricted the availability of private and public housing to blacks in suburban New Castle County. 393 F. Supp. at 435. In *Board of School Commissioners,* the Seventh Circuit affirmed a finding that all public housing in the county had been located within the boundaries of the Indianapolis public school district and this was the segregative intent of state agencies.[24] 637 F.2d at 1110-11.

Footnote continued—

at 59, and Raytown, *id.* at 94. There was no credible evidence of housing discrimination in North Kansas City that had substantial interdistrict effect and much of the development there occurred after the effects of the few covenants were mooted by *Shelley,* id. at 83, and similar development after *Shelley* eliminated the effect of such covenants in Grandview. *Id.* at 53.

23. Both cases dealt not only with the housing issue, but also contained strong findings based upon boundary violations. See Part VI, *infra.*

24. On similar facts in *United States v. Yonkers Board of Education,* 624 F. Supp. 1276 (S.D.N.Y. 1985), decided after submission of this case, a New York district court imposed an

(Continued on following page)

In this case the district court findings are far different. There was no lack of balance between federally assisted housing within the KCMSD and the suburban areas, as demonstrated by the 6,832 HUD-insured or subsidized multi-family units within KCMSD and 9,872 such units in the eleven SSDs. *Jenkins v. Missouri,* 593 F. Supp. at 1499. HUD efforts were designed to insure that participating section 8 certificate-holders were aware that affordable housing was available throughout the entire community and that they were informed of their rights under the fair housing laws. *Id.* at 1500. The court pointed to the affirmative marketing efforts in the Parvin Estates area, located in predominantly white North Kansas City, which were never able to attract more than 12% minority residents. *Id.* The district court further found no evidence that the practices of HUD in site selection and approval for federally subsidized multi-family hous-

---

Footnote continued—

interdistrict remedy based on housing violations. The detailed findings of the district court established a lengthy chain of actions which were designed to and succeeded in concentrating the black population in southwest Yonkers and in maintaining east and northwest Yonkers as overwhelmingly white communities. In contrast to the facts presented in this case, not one of Yonkers' subsidized housing projects for families was located in the overwhelmingly white neighborhoods of the city's east and northwest sections. Sites for such projects in white communities were repeatedly considered and rejected. Such action contributed significantly to extreme segregation in Yonkers. *Id.* at 1364-65. More than 30 years of subsidized housing activity with a sizeable and changing group of city officials sharing responsibility was involved. *Id.* at 1369. Over that period, there was constant strong community opposition following proposals of sites, a political structure likely to make community opposition effective, and extreme consistency in sites in east Yonkers and other heavily white areas being rejected. Whatever the personnel, there was a common theme that racially influenced opposition to subsidized housing in certain areas of the city and acquiescence in that opposition by city officials. *Id.* at 1369-70. The court found that the extreme concentration of subsidized housing in southwest Yonkers was the result of a pattern and practice of racial discrimination by city officials. *Id.* at 1373.

ing had a substantial effect upon the racial make-up of schools in KCMSD. *Id.* at 1499. The findings contained in the analysis of HUD's liability also relate to LCRA and HAKC.

The facts relied on to support the housing violations in *Evans* and *Board of School Commissioners* are directly contrary to those found in this case. These cases simply give no assistance to the argument that there have been constitutional violations by housing actors having a significant segregative effect in the SSDs.

Other findings on housing practices are significant. The district court specifically found that FHA appraisal practices before 1950 had at most a de minimis effect on present racial housing patterns. It examined LCRA practices and its role in administering urban renewal programs under the Housing Act of 1949. It found that HUD had investigated LCRA and issued a report in April 1972 finding discrimination in LCRA's referral practices and in requiring that such practices be ceased and reports filed. Failure to correct this led in June 1973 to refusal to fund the program and a cooperative agreement between HUD, LCRA, and the City of Kansas City by which the city assumed responsibility for relocation under the Act. The relocation report showed that during the period from 1971 to 1976, only 174 black families were relocated. *Jenkins v. Missouri,* 593 F. Supp. at 1497-98. Again, the finding of the district court concerns and is limited to intradistrict claims. This finding is not sufficient to justify remand to the district court for consideration, as Judge Arnold suggests, of what interdistrict effect may have resulted from such actions.

The district court found that while the HAKC constructed seven family projects between 1952 and 1963

within the model cities or urban renewal areas, the location was in accordance with congressional acts and the assignment practices were approved by HUD. *Id.* at 1498-99. The court reviewed HUD policies and found expenditures to be balanced between KCMSD and the suburban areas. *Id.* at 1499. It further found no evidence that the practices of HUD in site selection and approval for federally subsidized multi-family housing substantially affected the racial make-up of schools within the KCMSD. *Id.*

These findings clearly were made with reference to the claims against HUD. They do not apply to the housing practices in KCMSD. They belie the possibility of interdistrict effect occurring in the SSDs.

Another weakness immediately is apparent in analyzing the Jenkins class' arguments in the context of the district court's findings. The activities of LCRA and HAKC to which attention is primarily pointed, the investigation and the change in practices, both occurred in the 1970's after KCMSD had experienced the substantial increase in black school population. The exhibit relied upon by the district court in its findings demonstrates that the KCMSD black population was 18.9% in 1955-56, that it had grown to 30.7% in 1961-62, and had reached 50.2% in the 1970-71 school year. The substantial increase which resulted in the district becoming majority black thus had occurred before the particular events to which the Jenkins class points. To argue that alleged LCRA and HAKC violations created these interdistrict effects simply ignores logic.

The court specifically found that KCMSD assignments of children to particular schools had an intradistrict effect and were not influenced by any SSD. Further, these ac-

tions did not have a significant effect on the enrollment in any SSD. Order of June 5, 1984 at 38.[25]

The court considered many non-governmental housing factors and rejected the theory that liability may be imposed upon the SSDs for being the recipients of people moving for whatever reason. The court found that redlining, steering, and block-busting practices by private real estate agents, which may have affected the racial composition of KCMSD, were not the actions of KCMSD or of any SSD and are beyond the control of any school district. The transition of neighborhoods from white to black and accompanying white flight existed in Kansas City since the 1940's, but no testimony linked the SSDs to the process. *Id.* at 41. Absent a nexus between the conduct of the SSDs and the policies or practices of independent housing actors, the court would not hold the SSDs liable for racial imbalance. *Id.* at 42.

Judge Arnold stresses the district court's findings that there is a dual housing market impacting blacks in the KCMSD and causing the public schools to swell in black enrollment, 593 F. Supp. at 1491, and that the State had encouraged racial discrimination by private individuals. *Id.* at 1503. The court went no further but commented that the question of State liability would be close if it hinged solely on this encouragement of private discrimination.

25. Chief Judge Lay's dissent devotes considerable discussion to the findings of the district court in the intradistrict hearing concerning the acts of KCMSD. It refers to the movement of the black population from the central city in a southeast direction. *See* 593 F. Supp. at 1494. The dissent embarks upon factfindings of its own, however, when it argues that such movement "directly result[ed] in displacing whites into the SSDs." Chief Judge Lay's dissent at 98-99. This is directly contrary to the finding of the district court in its consideration of interdistrict liability, and the dissent makes no effort to consider these statements in a proper Rule 52(a) analysis.

tion. It then proceeded to base its finding against the State on the intentional creation of the dual school system in KCMSD and the failure to eradicate its vestiges. The Jenkins class makes much of these statements by the district court. Nevertheless, they fall short of making a specific finding of a constitutional violation, and certainly make no finding of any interdistrict effect. That the findings are in the district court's separate opinion concerning intradistrict liability prevents extension of such findings to arguments regarding interdistrict effect in the SSDs.

Thus, even accepting the Jenkins class' arguments that the district court misread *Milliken* by improperly limiting its inquiry solely to whether the SSDs were guilty of committing constitutional violations, we conclude that the factual findings of the district court effectively foreclose findings of interdistrict effect in the SSDs flowing from constitutional violations with respect to housing that may have occurred in KCMSD.[26] It is, of course, evident from

26. A recent article, *Housing Discrimination as a Basis for Interdistrict School Desegregation Remedies*, 93 Yale L.J. 340 (1983), flatly argues for the extension of housing as a basis for metropolitan school desegregation remedies and as a means of overcoming the *Milliken* barriers. It outlines in some detail the use of this theory in various desegregation cases, including this one. *See id.* at nn. 20 & 21. Its description of the limitations of this theory are of interest:

> By contrast, the housing approach is limited in two ways. It does not justify expansion of the remedy beyond the geographical area of operation of the housing authority or other governmental entity found guilty of constitutional violations. Further, the scope of the remedy is limited to the extent to which *official housing discrimination demonstrably caused school segregation*. Consequently, the housing approach is consistent with the agency principle that seeks to prevent local agents of the state from escaping participating in remedies for their own wrongdoing.

Id. at 347 (emphasis added) (footnotes omitted). There simply is no evidence in the record in this case that official housing discrimination caused school segregation and the findings of the district court as we have outlined above so demonstrate.

the findings that there were no constitutional violations in the SSDs. Under *Milliken* this answers the arguments made by the Jenkins class, as well as the further articulation in the arguments of KCMSD, and forecloses efforts to require the SSDs to be subject to the claim for interdistrict relief, be it consolidation or some step less drastic.

To consider isolated bits of evidence, de minimis in nature, and to mix this with speculation is insufficient to support the conclusion that there are additional factual issues not passed upon by the district court. The findings made were adequate to dispel the conclusion required by *Milliken* that there be significant segregative effects in the SSDs caused by actions of a constitutional violator in KCMSD.

The housing discussion is not complete without another word of caution. Plaintiff's expert, Dr. Gary Orfield, testified that the Kansas City metropolitan area, located in both Missouri and Kansas, comprised a single housing market. Dr. Kane testified that 7,239 black students now in Missouri schools would be in Kansas schools had there not been housing discrimination. Record at 7669-70, Pl's Exhibit 1265-R. A number of witnesses called by plaintiff testified their children were moved from the KCMSD to Johnson County, Kansas. Record at 6722-23, 6809, 6863-64, 6953. The district court dismissed the Kansas districts from this action in its order of October 6, 1978. *School District of Kansas City v. Missouri*, 460 F. Supp. at 431. Accordingly, it made no findings on these issues. This evidence, however, points to the serious complications present in a claim based on housing violations where the housing market extends into another state and there is movement from an impacted district into the other state.

VI.

The Jenkins class relies particularly on decisions from Wilmington, Louisville, Indianapolis, and Allegheny County, in which interdistrict remedies had been ordered. These cases involved gerrymandering; the present case does not. The district court specifically found that the establishment and maintenance of school district boundaries was a local matter in Missouri, determined through local initiative, and uninfluenced by racial animus. The district court thus held the gerrymandering cases inapposite. We agree.

Evans v. Buchanan, 393 F. Supp. 428, considered the effect of Delaware legislation explicitly prohibiting the state board from altering the boundaries of the Wilmington school district, fixed as coterminous with the Wilmington city limits. The district court found no racially discriminatory purpose in the Act's freezing of the Wilmington district's boundaries. *Id.* at 439. It held, however, that the Act helped to maintain the racial identifiability of the Wilmington and the suburban New Castle County school districts and thus contributed to the segregation of the races. *Id.* at 445-46. The district court also found that the Wilmington district and the suburban districts were not meaningfully separate and autonomous. *Id.* at 428.

Similarly, in *Newburg Area Council, Inc. v. Board of Education*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975), the court observed that while the county was established by statute as the basic educational unit, "school district lines in Kentucky ha[d] been ignored in the past for the purpose of aiding and implementing continued segregation," and that "[s]uch disregard continue[d] to have an effect on the racial imbalance in the county's

schools * * *." *Id.* at 1360. In addition, the court specifically recognized that both the Louisville and Jefferson County school districts had failed to eliminate all vestiges of state-imposed segregation. *Id.* at 1359. Accordingly, it is clear that unlike the present case, the Louisville boundary lines were purposefully manipulated to maintain segregated school districts.

United States v. Board of School Commissioners, 637 F.2d 1101, involved the exclusion of certain school districts from the Uni-Gov legislation which perpetuated the segregated white schools in suburban Marion County. *Id.* at 1105. The issue involved was whether the school boundaries should coincide with the expansion of the boundaries of the City of Indianapolis. The Fourth Circuit affirmed the findings that the decisions were made with discriminatory purpose. *Id.* at 1108.

In *Hoots v. Pennsylvania*, 672 F.2d 1107 (3d Cir.), *cert. denied*, 459 U.S. 824 (1982), the court pointed to findings that in 1971 the state and county boards intentionally created a district which was 63% black, and four nearby districts that were from 87% to over 99% white. *Id.* at 1111. This process involved the redrawing of school boundaries, and as such was a constitutional violation. *Id.* at 1120. The violation was interdistrict in nature and required interdistrict relief.

These cases all involve governmental action fixing or ignoring boundaries with discriminatory intent. The findings in the case before us are to the contrary. These cases are therefore distinguishable as are the boundary cases such as *Morrilton*, considered by this court. See Part IV, *supra*. These decisions upon which the Jenkins class so heavily relies, when viewed in light of the findings made

by the district court, plainly have no applicability to the present case. The district court therefore correctly rejected arguments based upon them.

VII.

To the contrary, other decisions relied upon by the district court carry great force. *Lee v. Lee County Board of Education*, 639 F.2d 1243, distinguishing *Newburg* and *Evans*, refused to impose an interdistrict remedy on truly autonomous local school districts. *Taylor v. Ouachita Parish School Board*, 648 F.2d 959, 966 (5th Cir. 1981), also found autonomous school districts and an intradistrict violation as opposed to interdistrict violations. A showing of segregative effect alone was considered to be insufficient under *Milliken* without demonstration of interdistrict violation and interdistrict effect.

Goldsboro City Board of Education v. Wayne County Board of Education, 745 F.2d 324, presents many similarities to the case before us. The argument was made, similar to that advanced by the Jenkins class, that the district court erred in its legal ruling that the county board owed no duty to the city board to decrease the proportion of blacks in the city schools. Both the city and county school districts were unitary. The court in *Goldsboro* stated:

> An independent school district which has not caused segregation in a neighboring independent district has no duty to rectify a racial imbalance in the other district. * * * Both the City and County were found to have unitary school systems. * * * *Swann* implies that once a school system is unitary it has no duty to go to extraordinary measures to compensate for demographic changes it did not cause or encourage.

Id. at 328-29 (citations omitted) (footnote omitted). *Goldsboro* rejected the argument that it violated the Constitution by maintaining separate county and city school districts which, while racially neutral when created, had in the face of demographic changes made the population of the city schools more black.[27]

The Atlanta case also involves facts similar to those before us. The decision of a three-judge court in *Armour v. Nix*, 16-708 (N.D. Ga. 1979), *aff'd*, 446 U.S. 930 (1980), denied an interdistrict remedy. *Armour* discussed particularly past conditions and practices and stressed the need for a current interdistrict effect. The holding in *Armour* was best summarized in *Lee v. Lee County Board of Education*, 639 F.2d 1243, as follows:

> *Armour* involved the City of Atlanta school district and a number of suburban county districts in the metropolitan Atlanta area. The demographic pattern was a familiar one. The City of Atlanta, and its school system, has become smaller and predominantly black, as the surrounding suburban communities have expanded rapidly and become predominantly white. Given these residential patterns, no intradistrict desegregation plan promised any degree of meaningful racial integration of the public schools within the city district. In *Armour*, the court concluded that interdistrict relief would, nevertheless, be inappropriate because the current pattern of pervasive residential segregation, which the court found to be the proximate cause of the racial

27. *Goldsboro* commented about the myriad reasons for increase in black population in metropolitan areas, referring to *Bradley v. School Board of the City of Richmond, Va.*, 462 F.2d 1058, 1066 (4th Cir. 1972), *aff'd without opinion by an equally divided court*, 412 U.S. 92 (1973). *Goldsboro*, 745 F.2d at 330 n.9.

> disparities in the population of the various districts, was not the direct result of any official action on the part of the school authorities or any other governmental agent.

Id. at 1259 (footnote omitted).

It is interesting to observe that the central thrust of the jurisdictional statement filed with the Supreme Court by appellant in *Armour* is based on acts of state actors causing housing segregation in the greater Atlanta area, which, it was argued should require an interdistrict remedy. The Supreme Court's summary affirmance of *Armour*, therefore, provides precedential guidance for us. *Tully v. Griffin*, 429 U.S. 68 (1976); *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).

VIII.

Yet another reason gives strong support to the district court's denial of interdistrict relief. The district court, as we have observed on several occasions, made strong findings that the SSDs had become unitary and had eliminated all vestiges of the dual school system at least by the early 1960's.[28] This makes appropriate, as the district court correctly recognized, the Court's discussion in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1:

> At some point, these school authorities and others like them should have achieved full compliance with

28. Chief Judge Lay in his dissent argues that the SSDs did not satisfy the requirements of *Brown* by simply adopting a racially neutral position. The argument that the SSDs must do more to counteract the interdistrict effects flowing from the pre-1954 interdistrict violations completely and totally ignores the district court's findings that any pre-1954 acts had negligible and de minimis current effects.

this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Id. at 31-32.

The district court found that in the 1954-55 school year 18.9% of KCMSD's students were black and that the district was majority white in enrollment until 1970. *Jenkins v. Missouri*, 593 F. Supp. at 1492. The exhibit upon which these findings were based further demonstrates that the district became 30% black in the 1961-62 school year, 40% black in the 1965-66 school year, and 60% black in the 1975-76 school year. The significance of these findings is that the increase in black population in KCMSD accelerated after the SSDs eliminated the vestiges of the dual system and began operating unitary school systems. The situation is similar to that in *Goldsboro*, 745 F.2d at 328-29.

In *Riddick*, 784 F.2d 521, the court stated:

> But once the goal of a unitary school system is achieved, the district court's role ends.
>
> * * *
>
> We have only recently examined both *Pasadena* and *Swann* and concluded that a district court's power to effect additional remedial orders is limited. "Once a school system has achieved unitary status, a court may not order further relief to counter-act resegregation that does not result from the school system's intentionally discriminatory acts." *Vaughns*, supra, at 988. Other courts have reached the same conclusion. *Davis*, supra, 721 F.2d at 1435 ("Changes in neighborhood ethnicity taking place after school officials have transformed their system into a unitary one need not be remedied, of course, for school officials are under no duty to adjust for the purely private acts of those who chose to vote with their feet."); *Ross v. Houston Independent School Dist.*, 699 F.2d 218, 225 (5th Cir. 1983).

Id. at 535-37.

Thus, the findings of the district court that the SSDs had become unitary, and that only later did the KCMSD's black population grow, together with the explanation in *Swann*, compel the conclusion that there be no further intervention by federal courts with the SSDs.[29]

---

29. The Supreme Court, in *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), pointed to the continued vitality of this principle.

IX.

The district court dismissed the claims that HUD, in administering housing policies and programs, had violated the Fifth Amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, 41 U.S.C. § 2000(d), *et seq.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*, and various housing laws and regulations.

We have discussed briefly, in the housing context, the Jenkins class' claims against HUD. It claims that HUD violated its Title VII and Title VIII obligation by continuing to fund LCRA and HAKC after it knew that that agencies employed racially discriminatory housing practices, and by continuing to administer its section 8 housing program in a manner which is segregative in fact. Section 8 is a housing assistance payment program in which HUD issues certificates to low income renters who then present these certificates to landlords for rental payments. The Jenkins class maintains that HUD failed to direct the certificate recipients to integrative locations and, as a result, three-fourths of certificate holders rent in predominantly black housing units within the KCMSD. It further contends that HUD administered its section 235 single-family mortgage assistance program in a manner which funneled blacks into transitional areas of KCMSD and whites into the SSDs. Ultimately, the Jenkins class asserts, HUD allowed foreclosed section 235 housing in these transitional areas to deteriorate, thus contributing to white flight into the suburbs. They finally charge that although HUD abandoned its 1960s "social homogeneity" policy, it took no steps to encourage families benefiting from its housing programs to make integrative choices.

The district court addressed these contentions in denying the claims against HUD. The Jenkins class simply reasserts these claims on appeal. They do not assert that the district court's underlying factual findings are clearly erroneous. With respect to HUD's relationship with HAKC and LCRA, the court found, as we discussed above, that HUD investigated the violations and entered a cooperative agreement with those agencies and the City of Kansas City to correct the violations. The court found that HUD acted in a reasonable and responsive manner, that its conduct was not arbitrary and capricious, and concluded that there was no violation of plaintiffs' fifth amendment rights. *Jenkins v. Missouri,* 593 F. Supp. at 1498-99. Regarding section 8 certificate-holders, the court found no evidence that HUD attempted to direct these individuals into particular housing areas. With respect to the other siting issues, the district court found that HUD followed a balanced housing policy and, by assisting housing projects in the suburban area, attempted to ensure that housing located in inner-city areas was balanced. *Id.* at 1499. Further, it is again relevant that the section 235 program, authorized by the National Housing Act in 1968, began essentially after the massive shift in the racial population of southeast Kansas City had occurred. Record at 12048-49. Most of these schools had by then become predominantly black. The rapid racial turnover was attributed by plaintiffs' witnesses to a variety of non-HUD related factors and was considered by one of plaintiffs' expert witnesses to be inevitable. Record at 12034, 12061. Plaintiffs' expert, Dr. Gary Orfield, testified that by 1954 the KCMSD schools, like those of most central cities in the country, were on course to become predominantly black, regardless of the desegregation actions taken at that point. Record at 14891-93.

We conclude that plaintiffs' arguments do not show that the district court erred as a matter of law in its judgment for HUD. We affirm the district court's dismissal of the claims against HUD.

X.

Finally, the KCMSD challenges the district court's ruling that for lack of standing KCMSD must be dismissed as a party plaintiff and realigned as a defendant. KCMSD argued that it sustained economic injury through the action of the other defendants and therefore had standing to seek recovery against them. The district court carefully considered this and other arguments urged by KCMSD to proceed as a party plaintiff. The court recognized a potential conflict between the interests of students seeking to demonstrate the existence of segregative conditions in the area, and those of the KCMSD, which would resist the introduction of incriminating evidence concerning its own past or present actions. *School District of Kansas City, Mo. v. Missouri*, 460 F. Supp. at 441. The findings of KCMSD liability in the Order of September 17, 1984, *Jenkins v. Missouri*, 593 F. Supp. at 1492-95, 1504, 1506, and the Order of June 14, 1985, confirm the concerns of the district court in October 1978 that a conflict of interest existed. The district court therefore did not err in dismissing KCMSD as a party plaintiff and realigning it as a defendant.

XI.

We now consider the intradistrict remedy ordered by the district court. No one challenges the substantial portion in which the costs are divided evenly between the State and the KCMSD. These include a program to achieve

the AAA rating which would include library improvement and teaching load and curriculum improvements and addition of counselors. The implementation of a summer school program and full-day kindergarten, before- and after-school tutoring, and an early childhood development program are the other remedial steps ordered by the district court. These programs impose a cost over a three-year period on both the State and KCMSD of $10,140,472 each.

The State, however, challenges an improved student achievement program which essentially involves grants to each of the schools in KCMSD for a three-year period, the voluntary interdistrict transfer plan, and the reduction of class size proposal, all of which involve costs to be imposed upon the State alone. We will consider each of these items in turn, as well as the capital improvements program which imposed a cost on the school district of $10,000,000 over a three-year period, and $27,000,000 on the State over the same period.

We have approved remedial and compensatory programs in school desegregation cases. *See Liddell v. Missouri*, 731 F.2d 1294. There we stated, in a portion of the opinion joined by eight judges of this court:

> [T]o remedy the effects of a dual system which operated for decades with the sanction of law, remedial efforts must also concentrate on *systemic* educational improvements.
>
> A secondary remedial objective of the quality education improvements is to enhance the appeal of the city school system, thereby promoting the chances of a stable and successful voluntary desegregation plan. The exodus of white parents and students out of fear

of integration, or "white flight," is no excuse for school officials to avoid desegregating.

Id. at 1313 (emphasis in original) (citations omitted).

The district court properly recognized this principle when it stated in its Memorandum Opinion of June 14, 1985:

> Measures requiring educational improvements have been incorporated into many desegregation remedies. * * * The use of ancillary programs to improve the educational quality of a school district in a desegregation remedy is based upon the federal district's "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past. . . ." * * * No party to this case has suggested that this plan should not contain components designed to improve educational achievement. In fact, it is "appropriate to include a number of properly targeted educational programs in a desegregation plan" (State Plan at 5). This is true because "individuals in our society who do not possess the levels of skill, literacy, and training essential to this new era will be effectively disenfranchised, not simply from the material rewards that accompany competent performance, but also from the chance to participate fully in our national life." *A Nation at Risk* at p. 7.

Memorandum Opinion of June 14, 1985 at 3-4 (citations omitted).

Recognizing these principles, a number of the programs designed to improve student achievement are not the subject of attack in this appeal before us.

A.

The State argues that the voluntary interdistrict transfer plan imposes an interdistrict remedy for an intradistrict violation. The State concedes that this argument was rejected in *Liddell*, 731 F.2d 1294. This court there held, relying on its earlier decisions in the *Liddell* litigation, that a voluntary interdistrict program was a "valid part of the attempt to fashion a workable remedy within the city" and would be entirely enforceable against the State. *Id.* at 1303.[30]

Our holding in *Liddell* was the basis for the following findings of the district court:

> To accomplish desegregation within the boundary lines of a school district whose enrollment remains 68.3% black is a difficult task. As this Court stated in its January 25, 1985 order, "because of restrictions on this Court's remedial powers in restructuring the operations of local and state government entities," any *mandatory* plan which would go beyond the boundary lines of KCMSD goes far beyond the nature and extent of the constitutional violation this Court found existed. * * * In addition, voluntary interdistrict transfers may serve to provide additional opportunities for desegregated schools as well as desegregative educational experiences for KCMSD students.

Order of June 14, 1985 at 31 (citations omitted).

---

30. A voluntary interdistrict program is one that has great potential for improving the racial balance in the Kansas City area. The experience in St. Louis with such a plan seems to have been favorable. The district court is correct in its holding that such a program cannot be mandatorily imposed upon the record before the court. Whether a refusal of a district to participate in such a voluntary program may evidence discriminatory intent and thus be an independent basis for further relief and mandatory participation is an issue that we should not anticipate.

The district court specifically found that the State had created the dual school system in Kansas City, that vestiges still lingered, and the obligations of KCMSD and the State to eliminate them have not been met. *Jenkins v. Missouri*, 593 F. Supp. at 1503-04. This finding of a constitutional violation, even though intradistrict in nature, is sufficient under the principles of *Liddell* to place upon the State the obligation to fund the voluntary interdistrict transfer program, under procedures enunciated in *Liddell*.

We believe, however, that the State properly raises a valid concern with respect to the requirement that the State pay KCMSD the full student foundation allotment for each student who transfers from KCMSD to a SSD. KCMSD, after all, has also been found to have violated the Constitution. We believe that the situation is not unlike that in St. Louis where both the State and the school district were constitutional violators in an intradistrict violation. There we approved payment by the State on one of two formulas, either one-half of the State aid the district would have received had the student not transferred, or, if a district sends more students than it receives, State aid based on the district's enrollment for the second prior year. *Liddell*, 731 F.2d at 1302. We also have concern that the court has given to the State alone full authority to monitor the voluntary interdistrict program. We believe that the use of a citizens committee in the St. Louis area with authority to monitor the program and assist in recruitment has been most effective. We direct that the district court modify its order on the voluntary interdistrict program so that it is consistent with that approved in *Liddell*.

B.

The State argues that the district court improperly ordered it to fund an increase in the number of teachers above and beyond that necessary to meet AAA standards.[31] The district court found that "achieving reduced class size is an essential part of any plan to remedy the vestiges of segregation in the KCMSD." Memorandum Opinion of June 14, 1985 at 13.[32] The district court analyzed the school system in detail ordering an increased number of teachers so as to reach the achieved class size goals. It placed the entire burden of this cost on the State and required that any responsibility beyond the minimal goals would be borne by KCMSD. The order contains no findings specifically directed to the issue of the liability of the State for this cost as opposed to that of KCMSD. We believe this portion of the order is infirm in two respects. First, it goes beyond the scope of our order in *Liddell*, which approved the requirements that would bring the schools within the AAA standing, but only as applied to the non-integrated schools. It also runs counter to the *Liddell* provision for funding equally divided between the State and the school district. 731 F.2d at 1318. As we have observed, both KCMSD and the State are constitutional violators. We see no reason for this cost being placed solely on the State. We direct the district court to modify that portion of its order dealing with reducing elementary and secondary school class size so as to divide the cost equally between the KCMSD and the State.

---

31. That portion of the court's order relating to achieving AAA status divided costs evenly between the State and KCMSD. None of the parties object to this portion of the ordered remedy which provides for an increase in librarians and teachers primarily for the purpose of providing additional planning time.

32. This program carried a total cost of $12,000,000 with payments of $2,000,000, $4,000,000, and $6,000,000 for each of three years.

C.

The State also objects to that part of the court's order providing for an effective school program, with the goal of improving student achievement, to be funded entirely by the State. This program provides specific grants for each school, in an amount higher for those with 90% or more black enrollment. Over three years, it totals $17,000,000.

The district court made detailed findings with respect to the first year's expenditures and the components to be considered that year, and ruled that later years would be determined by a school advisory committee at each school making recommendations to the School Board. Memorandum Opinion of June 14, 1985 at 22. The goals of the program were to be directed toward improvement of elementary reading and improving the pass rate on the BEST on the secondary level. We have no difficulty concluding that the findings of the district court support the creation of this fund as its purpose is to provide programs that would enhance education. Nevertheless, we see no findings in the district court order that in any way substantiates placing the entire burden of this program on the State. We believe that the cost should be shared equally between the State and KCMSD and direct that the district court modify its order in this respect.

D.

The State argues that it should not be required to furnish $27,000,000 toward a $37,000,000 capital improvement program.

The district court found that the average age of the sixty-eight school buildings utilized by KCMSD is fifty-

eight years and that improvement of school facilities is an important factor in the overall success of the desegregation plan. The district court said:

> Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

Memorandum Opinion of June 14, 1985 at 34.

These findings of the district court are sufficient to support its conclusion that capital improvements are necessary for successful desegregation. The State raises a troublesome argument based upon the finding of the district court that the buildings in the school district were in need of repair because of deferred maintenance and the failure to maintain the buildings. It argues that this was not the result of an unlawful action by the State. Nevertheless, we believe that the district court findings establish the propriety of this portion of the remedy and because the State is a constitutional violator, it has the obligation to support its proportionate share of this aspect of the remedy. Once again, however, we believe that the equal division between the State and KCMSD, both constitutional violators, is more equitable, and is consistent with our earlier opinion. *See Liddell* 731 F.2d at 1318-19.

Further findings support our view. The district court found that the deferred maintenance was a result of KCMSD's lack of financial resources as evidenced by its inability to pass a capital improvements bond issue, al-

though several attempts had been made since 1965. Memorandum Opinion of June 14, 1985 at 33. This is not unlike the situation in St. Louis where only one bond issue was passed in the last twenty-four years and thirteen were rejected. We are troubled with the district court's reasoning in which it takes into consideration the expenditure by KCMSD of $15,000,000 to $18,000,000 for implementation of an earlier desegregation plan for which it was not reimbursed and for its budgeting in the 1986 fiscal year of approximately $17,000,000 for desegregation programs not covered in the plan. The State argues that to apply such payments to justify additional contribution by the State is similar to the equitable restitution for payments unlawfully withheld in the past, which were condemned as contrary to the Eleventh Amendment by the Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974). In view of our conclusion that these costs should be shared equally by the State and KCMSD prospectively, we need not give further consideration to this troublesome issue.

E.

The State makes a final argument that the total cost of the funding placed approximately 80% on the State and only 20% on KCMSD. Our discussion of the specific items above and our conclusion that these costs should be shared equally by KCMSD and the State obviate our further consideration of these arguments. We have already pointed to the role of both as constitutional violators and we need not catalog further the acts of the State or of KCMSD that causes liability to be placed upon each entity. Equal division of costs between the local school authorities and the State was approved in *Milliken*, 433 U.S. at 277; *Penick v. Columbus Board of Education*, 519 F. Supp. 923, 942 (S.D.

Ohio), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); and *Reed v. Rhodes*, 500 F. Supp. 404, 424-26 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

We observe also that the record before the district court demonstrates that KCMSD has a higher property valuation than those in the SSDs[33] and that KCMSD has imposed upon itself a below average rate of tax levy. KCMSD had a levy of $3.43 per $100 while the other districts in the Kansas City metropolitan area had an average levy of $4.28. This real estate tax falls upon a property base, a great portion of which is highly developed commercial real estate, as opposed to single family homes occupied by students in KCMSD.

We are aware of the complexities of the State's funding of Missouri schools. While the district court made no findings on this subject, a memorandum filed by the State discusses the procedure established in Chapter 163, R.S.Mo. in great detail. The wealth of the school district plays a considerable role in determining the working of the State formula. As the formula deals entirely with distribution of funds, we believe that, should the district court determine it to be desirable, further consideration could be given to the working of this formula, particularly in reference to desegregation plans in the case now before us, and that in St. Louis, which we treated in *Liddell*, to determine whether there is any discriminatory motive or action in application of the formula and distribution of funds to school districts.

While our decision places greater financial obligation on KCMSD, it is our intention that the remedy ordered by

---

33. The valuation per pupil in KCMSD is $60,371 as opposed to averages of $40,000 in the SSDs. State Ex. 4.

the court be fully funded. We discussed in detail methods available to the district court to achieve this goal in *Liddell*, 731 F.2d at 1319-1323.

CONCLUSION

One further comment is in order. The record demonstrates in a number of areas that insofar as "white flight" may have been a factor in the Kansas City area, it cannot be considered without reference to the schools in the neighboring State of Kansas. This aspect of the case was not developed in detail nor did the court find it necessary to make findings on this issue. Nevertheless, it is a fact that might at some appropriate time in the future need to be given consideration in evaluating the segregation that may exist in the greater Kansas City area. Certainly, it would be appropriate and desirable, although we admit complex, to give careful consideration to inclusion of the Kansas schools in any voluntary interdistrict plan.

We affirm the judgment of the district court in favor of the SSDs and affirm the judgment of the district court and its intradistrict remedy imposed upon the State and the KCMSD with the exceptions we have discussed above that equalize the cost between the State and KCMSD.

ROSS, Circuit Judge, concurring.

I concur in Judge Gibson's opinion but write separately to emphasize to the parties in this case the importance of the admonition in footnote 30.

At the time of argument it was my understanding that a voluntary interdistrict program, patterned along the lines of the St. Louis program was a real possibility.

It would now appear that some of the districts are not moving forward with this plan.

In my opinion the failure to organize and implement this program would be a very significant factor in determining discriminatory intent in the future litigation which is certain to result from the further processing of this case. The St. Louis program would be a useful model for the actions to be taken by all the Missouri districts which are parties to this action.

ARNOLD, Circuit Judge, concurring in part and dissenting in part.

While I concur in much of what the Court has said today, I must respectfully dissent from those portions of the lead opinion concerning suburban school district (SSD) participation in a remedy for the interdistrict effects of the State of Missouri's housing violations. In all other respects, I concur in the judgment.

I would hold that the District Court erred in concluding that the SSDs cannot be required to participate in an interdistrict remedy for interdistrict school segregation caused by the State's constitutional violations in the area of housing. The case should be remanded to the District Court for determination of the current interdistrict effects, if any, of the State's housing violations. Any SSDs implicated by this analysis should be obliged to participate in an appropriately tailored interdistrict remedy.

I.

The District Court was of the view that no SSD could be made to take part in an interdistrict remedy unless there had been "a racially discriminatory act by [the

SSD] that substantially caused segregation in another district." Opinion of June 5 at 6, *citing Milliken v. Bradley*, 418 U.S. 717, 745 (1974). The District Court concluded that because the housing discrimination at issue here was perpetrated by the State and other governmental entities, rather than by the SSDs, the SSDs cannot be allotted a mandatory role in an interdistrict remedy for any resulting school segregation. Opinion of June 5 at 42.

This position involves a misconstruction of *Milliken*. In a passage which expresses the core of *Milliken*, Chief Justice Burger wrote:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann* [*v. Charlotte-Mecklenburg Board of Education*], 402 U.S. [1], at 16 (1971). Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially *discriminatory acts of the state* or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.

418 U.S. at 744-45 (emphasis added). Numerous other portions of *Milliken* further evidence the Court's view that an interdistrict remedy involving a school district may be based on discriminatory acts of the state or other school districts with interdistrict segregative effects on the school district in question. See, *e.g.*, *id.* at 745 ("With no showing of significant violation by the . . . outlying school districts *and* no evidence of *any* interdistrict violation or effect" (emphasis added), an interdistrict remedy was improper); *id.* at 748 (interdistrict relief unjustified because ". . . there has been no showing that either *the State* or any of the . . . outlying districts engaged in activity that had a cross-district effect." (emphasis added)); *id.* at 750-751 (discussing state activities as possible bases for interdistrict relief).

As support for the District Court's decision regarding housing, the lead opinion cites the discussion of *Milliken* in *Hills v. Gautreaux*, 425 U.S. 284 (1976).[1] Yet, *Hills* states that the Court in *Milliken* rejected an interdistrict remedy because, while the trial court had found that "constitutional violations committed by *the Detroit School*

---

1. The lead opinion does not make clear its precise view of the District Court holding that because the SSDs are not themselves constitutional wrongdoers, they may not be made part of an interdistrict remedy for State housing violations. See *ante* at 25-31. At points, the opinion appears to agree that *Milliken* precludes inclusion of non-culpable SSDs in an interdistrict remedy for State violations. See *ante* at 28-31. At other points, however, the opinion suggests that the District Court viewed the lack of SSD culpability simply as an important factor in determining that interdistrict relief was inappropriate, a factor considered along with factual findings as to the lack of interdistrict effects of state-fostered housing discrimination. See *ante* at 26, 28, 29. This is a mischaracterization of the District Court's position which understates the significance the District Court attached to SSD innocence. The District Court repeatedly made clear its view that the fact that the SSDs were not constitutional violators, taken by itself, *barred* requiring SSD participation in an interdistrict remedy. See Opinion of June 5 at 6, 34-42, 45, 47-48, 51, 53-54, 58-59, 66-67, 73-74, 78, 82-83, 89-91, 94-95, 97, 100-103. Further, the District Court did not determine whether or what interdistrict segregation is attributable to State housing violations, and never claims to have made such a determination; instead, having concluded that SSD innocence precluded interdistrict relief, the District Court found it unnecessary to devote substantial consideration to the question of interdistrict effects. See *infra*, Part II.

Board and State officials had contributed to racial segregation in the Detroit schools, . . . there had been neither proof of unconstitutional actions on the part of neighboring school districts *nor a demonstration that the Detroit violations had produced significant segregative effects in those districts.*" *Id.* at 792 (emphasis added). Further, in the portion of *Hills* quoted by the Court, *ante* at 27, the Supreme Court states: "In *Milliken*, there was no finding of unconstitutional action on the part of the suburban school officials and *no demonstration that the violations committed in the operation of the Detroit school system had had any significant segregative effects in the suburbs.*" 425 U.S. at 294 (emphasis added).[2]

Thus, it is not necessary that each school district subjected to an interdistrict remedy have itself committed a constitutional violation.[3] Instead, *Milliken* establishes that an interdistrict remedy is justified wherever discriminatory actions of either the state, or local school districts, or both, have had significant interdistrict segregative effects. The SSDs

> may not maintain that their districts should be excluded from any interdistrict remedy if they are

2. The lead opinion's citation of *Hills* is particularly ironic because the author of *Hills*, Mr. Justice Stewart, expressly stated in his *Milliken* concurrence that state officials' housing violations, if they had an interdistrict effect, would justify an interdistrict remedy. See *infra* at 64, *quoting Milliken*, 418 U.S. at 755 (Stewart, J., concurring).

3. Indeed, the principal opinion concedes that a constitutional violation in the operation of the KCMSD with interdistrict segregative effects felt in the SSDs would merit an interdistrict remedy involving the SSDs. See, *e.g.*, *ante* at 28. Yet it offers no explanation of how or why violations by the State or the KCMSD in operating KCMSD are to be distinguished from State housing violations. In either case the SSDs would themselves be innocent of wrongdoing, but would feel the effects of other actors' violations.

> found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions *such as a local housing authority* or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. *Cooper v. Aaron*, 358 U.S. 1, 15-17 (1958).

United States v. Board of School Commissioners, 573 F.2d 400, 410 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978) (emphasis added).[4]

Perhaps the paradigm case in which a state's constitutional violation merits interdistrict relief ever absent participation by the local school district in the violation is where the state draws boundary lines on the basis of race. See, *e.g.*, *Morrilton School District No. 32 v. United States*, 606 F.2d 222, 228 & n.5 (8th Cir. 1979) (en banc); *Hoots v. Commonwealth of Pennsylvania*, 672 F.2d 1107, 1119-1121 (3d Cir. 1982). But a state's actions also merit an interdistrict remedy where it or its subdivisions cause interdistrict school segregation by employing discriminatory housing laws, policies, or practices. "[W]here the state has contributed to the separation of the races . . . by purposeful, racially discriminatory use of state *housing* or zoning laws," it may be appropriate to enter "a decree calling for transfer of pupils across district lines or for restructuring of district lines." *Milliken*, 418 U.S. at 755 (Stewart, J., concurring) (emphasis added).

4. Of course, since formulation of an appropriate interdistrict remedy is guided by equitable principles, the fact that a school district has not itself violated the Constitution may affect the particular role it is assigned in remedying the state's violation. See *infra* at 75-76.

Thus, I take it as established that a school district can be made to participate in an interdistrict remedy even if it is not "personally" guilty of violating the Constitution, that such relief is appropriate where a State's constitutional violations have contributed to interdistrict segregation, that "State" for this purpose includes any state or local agency, and that there is nothing unique or peculiar about housing agencies that would take them out of this rule. These conclusions are established, not only by *Milliken* itself and the other authorities just discussed, but also by our own unanimous en banc opinion in *Morrilton School Dist. No. 32 v. United States, supra*. There, the Morrilton and Plumerville school districts argued that "since the government made no showing that either Morrilton or Plumerville participated in the development of the East Side District as a segregated district, the District Court's imposition of interdistrict relief was unwarranted." 606 F.2d at 225. We squarely rejected that argument:

> Morrilton and Plumerville argue that since there was no evidence implicating them in a direct way with the establishment of the East Side District, the court has no authority to order them to remedy the state's wrong. This argument is clearly without merit since the effects of the unconstitutional state action are felt in both districts.

606 F.2d at 228 (footnote omitted). We then quoted the very passage, explicitly mentioning housing, from *Board of School Commissioners*, 573 F.2d at 410, a portion of which I have already quoted. In light of this en banc opinion, which of course authoritatively states the law of this Circuit until and unless overruled, I do not know how the District Court's position—that the SSDs, because individually guiltless, cannot be made part of an interdistrict remedy—can stand.[5]

The Supreme Court has recognized on a number of occasions that there is a close reciprocal relationship between residential patterns and the racial composition of schools. See, *e.g.*, *Keyes v. School District No. 1*, 413 U.S. 189, 202 (1973); *Swann*, 402 U.S. at 20-21. The District Court here found that 'there is an inextricable connection between schools and housing." 593 F. Supp. at 1491. Other federal courts have ordered school districts to participate in interdistrict remedies based in part upon housing discrimination practiced by other branches of state government. *See Evans v. Buchanan*, 393 F. Supp. 428, 434-438 (D. Del.) (three-judge court), *aff'd*, 423 U.S. 963 (1975); *Board of School Commissioners*, 456 F. Supp. 183, 188-192 (S.D. Ind. 1978), *aff'd in part and vacated in part on other grounds*, 637 F.2d 1101, 1109-1116 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980). This Court should demonstrate no less concern for the segregative effects of state housing violations upon schools. When a state segregates children on a multi-district basis, whether it does so by drawing boundary lines or by steering or restricting the races to homes on different sides of pre-existing lines, the courts can provide interdistrict relief that includes all affected districts. See generally, Note, *Housing Discrimination as a*

---

5. The lead opinion maintains that *Morrilton* is a gerrymandering case that "must be limited to its facts." *Ante* at 30-31. Yet, the lead opinion provides no explanation of why the principles we approved in *Morrilton* are to be so limited in their application. It does not explain how or why State discrimination in drawing school district boundaries is to be distinguished from State discrimination in housing. Housing violations may be harder to prove or create special problems of remedy, but that does not mean that *no* remedy should be afforded.

Basis for Interdistrict School Desegregation Remedies, 93 Yale L.J. 340 (1983).[6]

II.

Having concluded that an SSD may be required to participate in an interdistrict remedy for any interdistrict effects of housing discrimination upon the SSD, I turn to the question whether the State or its subdivisions have committed any housing violations that have current interdistrict segregative effects. In its September 17, 1984 opinion, 593 F. Supp. 1485, the District Court found or referred to a number of instances of housing discrimination by the State and its subdivisions that could have had such segregative effects. However, examination of that opinion and of the District Court's June 5, 1984 opinion, in which it granted the SSDs' Rule 41(b) motions, persuades me that the District Court never finally determined whether or what current interdistrict segregation is attributable to these housing violations. Having concluded that the SSDs could not be required to participate in an interdistrict remedy, assessing the interdistrict effects of housing discrimination by the State was a task the District Court no longer found necessary. Although the principal opinion asserts that the District Court made findings that foreclose the possibility of interdistrict effects, the findings that it cites are largely not on point and do not resolve the question.

6. In a case relied upon by the District Court and by the principal opinion, *Bell v. Board of Education, Akron Public Schools*, 683 F.2d 963 (6th Cir. 1982), the Sixth Circuit refused to accept that an otherwise innocent school district could be made to participate in a remedy for the discriminatory housing practices of other governmental agencies. *Id.* at 968. I find this portion of *Bell* irreconcilable with the principles enunciated by the Supreme Court in *Milliken*, as well as with his Court's *Morrilton* opinion.

tion. The lead opinion's arguments on this point are in essence an exercise in appellate factfinding, an exercise that is unjustified since the record here is hardly so one-sided as to make any alternate findings clearly erroneous. This determination has not yet been made by the District Court, and must be before the book can be closed on the SSDs' liability to interdistrict relief.

Perhaps the clearest, most direct example of the State of Missouri's discrimination in the area of housing is the enforcement by its courts of racially restrictive covenants. See 593 F. Supp. at 1497. Even after state enforcement of such covenants was held unconstitutional in *Shelley v. Kraemer*, 334 U.S. 1 (1948), Missouri's courts continued to entertain damage actions for breach between parties to the covenant, see *Weiss v. Leaon*, 225 S.W.2d 127 (Mo. 1949), a practice the Supreme Court held unconstitutional in *Barrow v. Jackson*, 346 U.S. 249 (1953). Further, the District Court found that the State had in the past taken numerous other actions that were discriminatory against blacks, such as mandating separate schools for blacks and whites, Mo. Const. Art. IX, §1(a) (1945) (rescinded 1976), §§163.130, 165.117 R.S. Mo. (repealed 1957); providing that school boards could establish separate libraries, parks, and playgrounds for whites and blacks, §165.327 R.S. Mo. (1959); and making it a crime for a person of one-eighth Negro blood to marry a white person, §563.240 R.S. Mo. (1959). 593 F. Supp. at 1503. "These actions," the District Court found, "had the effect of placing the state's imprimatur on racial discrimination." *Id.* Thus, the state "created an atmosphere in which the private white individuals could justify their bias and prejudice against blacks," and "encouraged racial discrimination by private individuals in the real estate, banking, and insurance industries."

Id. The District Court concluded that "[t]his has and continues to have a significant effect on the dual housing market in the Kansas City area." *Id.*[7]

A predicate for interdistrict relief may also be found in discriminatory housing practices of the LCRA and the HAKC, which are both instrumentalities of state government for whose discrimination the State of Missouri is accountable.[8] Since it had determined that the SSDs could not be required to participate in an interdistrict remedy, and since it had found other bases for State intradistrict liability, the District Court considered these two entities only in connection with claims against HUD. Nonetheless, it appears from the Court's findings, as well as from evidence not addressed by the Court because it was not directly relevant to HUD's liability, that these agencies have committed housing violations that may have interdistrict segregative effects. Between 1953 and 1973, LCRA practiced discrimination in relocating persons displaced by urban renewal, steering blacks to southeastern Kansas City and relocating whites throughout the city. 593 F.Supp. at 1497-98. It appears that HAKC explicitly segregated its housing units until 1958, and that, despite

---

7. The District Court did not base its award of intradistrict relief against the State on these housing violations, since it found a "more salient reason," 593 F. Supp. at 1503, for State intradistrict liability in the State's failure to dismantle the dual school system it had created within the KCMSD. *Id.* at 1503-1504. The issue here, however, is whether interdistrict relief is warranted, an issue the District Court did not speak to in its evaluation of state housing discrimination.

8. Missouri's state legislature established the LCRA in 1953 and gave it, subject to the approval of Kansas City's government, citywide jurisdiction to administer urban-renewal programs. §§ 99.320(1), 99.330 R.S.Mo. The HAKC was created by the state legislature in 1939 and, subject to Kansas City's approval, given authority to administer low-income housing programs throughout the City. § 99.040 R.S.Mo.

the nominal adoption of a "freedom of choice" tenant-selection policy, HAKC may have continued segregative practices until 1964. Brief of Plaintiffs-Appellants Kalima Jenkins, *et al.*, at 24; Brief of Defendant-Appellee Department of Housing and Urban Development at 11.[9] Like Missouri's enforcement of racially restrictive covenants and encouragement of private discrimination, the discriminatory practices of LCRA and HAKC could have significantly affected the dual housing market in the Kansas City area; if these practices have current interdistrict segregative effects, they merit interdistrict relief.[10]

---

9. I would require the District Court to make findings on these points on remand.

10. I note at this juncture several concerns I have over the District Court's analysis of the claims against FHA and HUD.

From the mid-1930s through 1947, the FHA's appraisal manuals stressed the desirability of racial covenants, limited availability of mortgage insurance for developments not subject to racial covenants, and down-graded appraisals in neighborhoods undergoing integration. After 1947, the FHA removed explicit racial references from its manuals, but continued to emphasize in them the importance of "social homogeneity" and "compatibility among the neighborhood occupants." 593 F. Supp. at 1497; P. Ex. 1305. Although a number of other courts have noted the invidious character of these and other aspects of FHA's appraisal policies, see, *e.g.*, *Reed v. Rhodes*, 607 F.2d 714, 729 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980); *Oliver v. Kalamazoo Board of Education*, 368 F. Supp. 143, 182-183 (W.D. Mich. 1973), *aff'd*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), the District Court exonerated the FHA, reasoning that the FHA was merely gauging the economic realities associated with racial discrimination. 593 F. Supp. at 1497. I believe that in so holding the District Court overlooked the fact that FHA was not merely an uninvolved observer, but was rather an active participant in the housing market whose policies and practices had a significant impact on the market. FHA practices set a standard followed by other lenders and complied with by real estate developers who wished their developments to be eligible for FHA-insured financing, even if some units were not ultimately financed through the FHA. The FHA not only gave private discrimination considera-

(Continued on following page)

The District Court did find that the State's own discrimination had contributed significantly to the dual housing market in "the Kansas City area," 593 F. Supp. at 1503, and that "the dual housing market . . ., which still exists to a large degree today . . ., impacted blacks in the KCMSD and consequently caused the public schools to swell in black enrollment." 593 F. Supp. at 1491. But the Court provided no more precise findings on the question of to what extent black students were concentrated in the portion of Kansas City covered by the KCMSD rather than more evenly dispersed through the portions of the Kansas City area served by the SSDs. Nor did the District Court assess the interdistrict segregative effects of housing discrimination by the LCRA or HAKC. Again, because the

---

Footnote continued—

tion in its own conduct, but also encouraged others to engage in discrimination; this government cannot lawfully do.

The District Court's finding that FHA's policies and practices have no significant current effect may be similarly vulnerable. The Court based its conclusion on the fact that prior to 1950 FHA insured 15,000 homes in the KCMSD, and between 1950 and 1980 there were over 2,000,000 housing turnovers in the area. 593 F. Supp. at 1497. But the FHA's practices may have affected far more homes than were actually financed through the FHA.

With regard to HUD, the District Court found that the agency had acted "reasonably" because it had taken action in the 1970s to end discriminatory practices by HAKC, whose programs HUD funded. 593 F. Supp. 1498-1499. Yet there was extensive evidence, not addressed by the District Court, that HUD knew of shortcomings in HAKC's tenant-assignment practices for years without taking action to end them.

In view of the fact that, under the prevailing view in this Court, there will be no remand for further fact-finding on the effects of housing discrimination, I do not pursue further this line of argument. Under my view (shared in part by three other judges), there would be such a remand, and in that event it would be open to the District Court to reconsider its findings as to HUD and FHA and, if appropriate, bring them back in as participants in an interdistrict remedy.

District Court concluded that the SSDs could not be made to help remedy the violations of independent housing actors, it had no need to determine whether the State's housing violations have current interdistrict segregative effects.

The plurality does not contend, by and large, that the District Court addressed this issue directly, but instead contends only that a number of findings that the Court made in other contexts somehow negate the possibility of significant interdistrict effects. First, it is argued at various points that the fact that the SSDs have operated unitary school systems since a few years after *Brown* precludes the possibility that housing violations have caused interdistrict segregation. *E.g.*, *ante* at 21-23, 44-46. However, it is difficult to fathom how the fact that a school district is internally unitary indicates that school children have not been segregated on an *interdistrict* basis; that an SSD's schools are integrated with respect to children who live in the SSD has little bearing on whether, due to State housing discrimination, more whites and/or fewer blacks live in the SSD and, concomitantly, fewer whites and/or more blacks live in KCMSD, than would otherwise be the case. If the SSDs had not been unitary, their own discrimination might have added to any State-fostered interdistrict segregation that exists; that they are unitary indicates only that they have not augmented interdistrict segregation caused by state housing violations. Unitary SSDs are no longer under an obligation to undo *intradistrict* segregation, *Swann*, 402 U.S. at 31-32, but they still may be required to participate in a remedy for the current segregative effects of *interdistrict* segregation.

Next, the plurality argues that the District Court "was plain" that the State's pre-1948 enforcement of re-

strictive covenants has no current significant segregative effect. *Ante* at 33 & n.22. While I agree that the District Court made findings that dispose of the issue as to several of the SSDs, as to most of the SSDs the District Court did not make findings that are adequate to resolve the question whether present residential patterns would be significantly less segregated had restrictive covenants not been enforced. I agree with the lead opinion that there are no current segregative effects attributable to racially restrictive covenants in the Fort Osage School District, since there was no evidence of any such covenants located in that district, see Opinion of June 5 at 51; a similar conclusion is probably justified as to the Park Hill School District, see id. at 90. As to the nine remaining SSDs, however, I cannot agree that the District Court made findings sufficient to support a conclusion that the State's enforcement of restrictive covenants has caused no current interdistrict segregation. First, in each portion of the District Court's opinion discussing the restrictive covenants in a particular SSD, the District Court emphasizes the lack of SSD complicity in the placement or enforcement of the covenants within its boundaries. See, *e.g.*, Opinion of June 5 at 48 (Center School District); id. at 73 (Lee's Summit School District). Thus, the District Court's misconstruction of *Milliken* may have tainted its consideration of the restrictive-covenant problem.

Even were this difficulty absent, the District Court's remaining findings are still not adequate to support a finding of no current effect. As to the Center, Hickman Mills, and Raytown School Districts, the District Court noted that there was no evidence of any black family that failed to move into the districts because of the covenants, and that there is no present barrier to black movement

into the districts. *Id.* at 48, 58-59, 94. With regard to the Lee's Summit, Independence, and Liberty School Districts, the Court found that there were relatively few restrictive covenants in the districts, and that there was no evidence of any black family that failed to move into the district due to restrictive covenants. *Id.* at 66, 73, 77-78. Finally, the District Court observed that there were few racially restrictive covenants in the Grandview and North Kansas City School Districts, and that the effect of such covenants in these districts and the Blue Springs School District is limited or mooted by extensive post-*Shelley* residential development in those districts.

None of these findings resolves the question whether fewer blacks or more whites reside in the SSDs due to pre-*Shelley* and pre-*Barrow* enforcement of restrictive covenants. That there is no present barrier to black movement into an SSD hardly demonstrates that there was no barrier to such movement in the past that has current effects. That extensive post-*Shelley* residential development has occurred does not mean that earlier enforcement of racial covenants has not helped make a district identifiably white and inhospitable to blacks, or that it has no other current effect on residential patterns. Finally, it was not necessary for the plaintiffs to give evidence of particular black families that did not move into a district due to restrictive covenants in order to demonstrate the segregative effect of such covenants; to hold that they had no segregative effect on this basis simply blinks reality.

Further, the District Court did not determine the current effects of the State's continued efforts to give legal force to these covenants from 1948 to 1953, and, more importantly, the imprimatur that the State placed upon pri-

vate housing discrimination by ordaining various forms of racial discrimination, see *supra* at 67-68.[11]

Finally, the plurality contends for two reasons that there can be no current interdistrict effects of housing violations by LCRA and HAKC. First, it cites the District Court's finding that HUD followed a balanced housing policy, locating federally funded housing in both KCMSD and in the SSDs, and that HUD's site-selection-and-approval practices had not affected the racial make-up of KCMSD schools. *Ante* at 36, citing 593 F. Supp. at 1499. Second, the lead opinion contends that the LCRA and HAKC practices of which the plaintiffs complain occurred in the 1970s, after KCMSD had experienced a substantial increase in black population. *Ante* at 37. Both of these points involve a misapprehension of the plaintiffs' claims: As to the first, the claim is not that unbalanced housing site selection and approval caused interdistrict segregation, but instead, that once the projects were built, HAKC explicitly segregated them, or later, steered whites to some projects and blacks to others. As to the second, the plaintiffs' complaint is not primarily about HAKC and LCRA activities in the 1970s; rather, the District Court found that LCRA practiced discrimination from 1953 to 1973, and the plaintiffs contend that HAKC segregated its housing units from its inception in 1939 until as late as the mid-1960s. See *supra* at 68-69.

---

11. However, I note with regard to the latter basis of State liability that the District Court stated, "To the extent, if any, that the racial composition of the KCMSD is the result of steering and blockbusting practices by private real estate agents . . . the Court finds that these actions of private individual real estate agents are not actions of the KCMSD or any SSD." Opinion of June 5 at 41. This reinforces my conclusion that the District Court has left open the question whether State-fostered private discrimination in the housing area has current interdistrict segregative effects.

I agree with Judge Gibson that there are many factors other than housing discrimination that may have contributed substantially to the present concentration of blacks in the KCMSD. See *ante* at 32-33. Insofar as economic and demographic factors unrelated to official discrimination caused interdistrict residential segregation, the State and the SSDs may not be required to remedy the concomitant interdistrict school segregation. See *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 433-437 (1976). I also agree that there are geographic limitations on the effects of housing discrimination, and that some of the effects of the State's constitutional violations may have been felt in Kansas, rather than in the Missouri SSDs. See *ante* at 40. But the District Court has not yet made any findings on these points, as well as many other issues bearing on the question of interdistrict segregative effects, and as the lead opinion itself observes, the District Court is " 'uniquely situated' " to assess such matters. *Ante* at 25, quoting *Little Rock*, 778 F.2d at 410-411; see *Morrilton*, 606 F.2d at 230.

Therefore, the case should be remanded to the District Court to determine precisely what current interdistrict segregative effects may be attributed to housing discrimination by the State, LCRA, and HAKC. Upon remand, the District Court should first consider this question from the perspective of the SSDs' Rule 41(b) motions. Any SSD that does not prevail on its motion should be permitted to present evidence to rebut a finding that it is implicated in the current interdistrict segregative effects of the housing violations. While the SSDs were given the opportunity to continue to participate in the proceedings after the District Court granted their Rule 41(b) motions, this was not "a meaningful opportunity

for [the SSDs] to present evidence . . . on the propriety of a multidistrict remedy." *Milliken,* 418 U.S. at 721-722. After the District Court had held that the SSDs could not be made part of a remedy for the constitutional violations of other governmental entities, the SSDs no longer had any reason to take part in the suit. Therefore, were this Court to reverse the District Court on this issue, the SSDs would be entitled to present evidence.

If, at the end of these proceedings, the District Court found current segregative effects of the housing discrimination, it should then formulate an appropriately tailored interdistrict remedy, a remedy including each affected SSD. I caution, however, that, in accord with the equitable principles that govern such remedies, *Milliken,* 418 U.S. at 737-738, the role that may be assigned to each SSD may be limited by the fact that the SSD is not itself a constitutional violator. Thus, it would likely be inappropriate to burden the SSDs, rather than the State, with the financial costs of the remedy. On the other hand, it seems clear that affected SSDs could be required to participate in an interdistrict transfer program designed to make the racial composition of the districts' schools what it would have been absent official housing discrimination.

III.

I conclude that an SSD, even if its own actions are without blemish, may be required to participate in an interdistrict remedy for the housing discrimination of the State of Missouri or its subdivisions, so long as that discrimination has current interdistrict segregative effects involving the SSD. The case should, in my view, be remanded to the District Court to determine whether the

established constitutional violations of the State and the LCRA, as well as the possible violations of the HAKC, have had any such effects. If the District Court finds that this discrimination has produced interdistrict segregation, it should fashion a remedy which accords with the principles discussed in this opinion.

Insofar as Judge Gibson's opinion departs from this view, I dissent; in all other respects I concur. It is appropriate to add that, although the plurality opinion in this case of course announces the judgment, it does not make law for this Circuit except in those respects that command a majority vote of the judges sitting in this case. Four judges seem to agree that school districts not individually guilty of constitutional violations may not be compelled to participate in an interdistrict remedy. Four do not. That question is therefore open for determination in future cases in this Circuit.

LAY, Chief Judge, with whom HEANEY and McMILLIAN, Circuit Judges, join, dissenting.

A world of rhetoric cannot hide the world of fact.[1] No one can deny that the school systems within the Kansas City metropolitan area were racially segregated before 1954, continued to be segregated after 1954, and that virtually all remain segregated today. The clearly erroneous rule, used by the lead opinion to give blanket approval to the district court's conclusions, was never intended to be a rule of blind deference. This is particularly true when, as here, the record does not support the district court's conclusions. This court's affirmance

---

1. Cf. T.H. Huxley, *Lay Sermons, Addresses, and Reviews* (1891) ("A world of fact lies outside and beyond the world of words").

of the district court, if allowed to stand, destines the Kansas City metropolitan area to racially segregated schools and a segregated community for decades to come. The lead opinion ignores Supreme Court precedent and brushes aside thirty years of this circuit's rulings mandating school integration.[2] The lead opinion also fails to acknowledge the district court's misunderstanding of *Milliken v. Bradley*, 418 U.S. 717 (1974), and the resulting erroneous legal premises on which the district court's conclusions are based. The effect of this pervasive error makes the lead opinion's analysis largely irrelevant to the record before us.

It now remains for the people of metropolitan Kansas City to choose whether their community and school systems shall continue to foster an environment of racial separation. Although many might respond that freedom of choice is essential to democratic government, this proposition should be accepted only so long as equality of opportunity is not denied to those who do not have the majority will on their side. Here, the tragedy of the legalized discrimination of the past century is that it has resulted in continued denial of acceptable equal opportunities to both the black and white children in the Kansas City area. The lead opinion closes its eyes both to Missouri's long history of legally-mandated segregation of and discrimination against blacks and to the uncontroverted evidence at trial that showed that for decades only the Kansas City metropolitan school district (KCMSD) provided blacks in the Kansas City metropolitan area with any educational opportunity at all. More-

2. For the history of this circuit's school desegregation rulings, see Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 Minn. L. Rev. 735 (1985).

over, for much of the period during which the suburban population dramatically increased, blacks were precluded by law or otherwise discouraged from residing anywhere other than the southeast corridor of the KCMSD.

Although a district court's findings of fact may not be overturned unless clearly erroneous, Fed. R. Civ. P. 52(a), an appellate court nevertheless has the power to correct errors of law, including factual findings that are predicated on a misunderstanding of the governing rule of law. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984) (quoted in *In Re Martin*, 761 F.2d 472, 475 (8th Cir. 1985)). Where, as here, the district court's factfinding process was tainted with legal error from the start of trial by the court's erroneous application of controlling legal principles, the district court's findings are entitled to less than usual deference and should be reversed as clearly erroneous.[3]

3. The lead opinion's reliance on *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), provides the basis of its criticism that this dissent "engag[es] in an original evaluation of the voluminous and ofttimes contradictory record seeking an ultimate conclusion more satisfactory than that reached by the district court." *Ante* at 18-19. It suggests that this dissent "embarks upon fact finding of [its] own" and makes no effort to consider [the district court's finding] in a proper Rule 52(a) analysis." *Ante* at 37 n.25. It also urges that the dissent "completely and totally ignores the district court's findings that any pre-1954 acts had negligible and de minimis current effects." *Ante* at 44-45 n.28.

I start with the legal premise, never refuted by the lead opinion, that the district court's opinion is fundamentally unsound because it is based on an erroneous legal premise in its interpretation of *Milliken* and because it totally ignores the historical and factual record. Not only is the record contradictory, as the lead opinion admits, but in its own opinions the district court contradicts itself. This dissent does not substitute the views of appellate judges for that of the trial court. What this dissent focuses on is that the district court's applica-

(Continued on following page)

The district court's own conclusions and the clear weight of the uncontradicted evidence establish that constitutional violations, committed by the suburban school districts (SSDs) and HUD as well as the State of Missouri and the KCMSD, have caused significant continuing segregative effects in the SSDs. I would reverse the district court's dismissal of the SSDs and HUD, holding that the plaintiffs have made out a prima facie case for interdistrict relief; I would remand for further evidentiary hearings with the SSDs and HUD reinstated as parties, with directions that new findings be made in light of this opinion and any further evidence produced. Thereafter, if the overall evidence so indicates, the district court should fashion an appropriate interdistrict remedy which incorporates the SSDs and takes into consideration the liability of HUD. The result of our divided vote is to endorse the district court's fragmentation of the plaintiffs' evidence and its refusal to draw obvious inferences from

---

Footnote continued—

tion of the law to its findings is erroneous, a conclusion to which the clearly erroneous standard does not even apply. It is not a duplication of the district court's role when on review an appellate court identifies errors in the district court's reasoning. In *Anderson*, the Supreme Court made it clear that to uphold a district court's findings as not clearly erroneous, the district court's account of the evidence in making those findings must be plausible in light of the record viewed in its entirety. *See Anderson*, 470 U.S. at 573-74. *Anderson* does not hold that a trial court's factfinding power is limitless, nor that appellate review is nothing more than a rubber stamp of the district court's actions.

Moreover, the lead opinion states that the Jenkins class and the KCMSD did not argue that the district court's findings are clearly erroneous. This assertion too conveniently seeks to avoid the legal arguments made by the appellants that the district court formulated conclusions which were incorrectly based upon erroneous legal premises. *See* Reply and Response Brief of Appellant/Cross-Appellee Kansas City, Missouri School District at 14-24.

that evidence and to thereby uphold the district court's denial of any form of interdistrict relief, the remedy most likely to eradicate the effects of years of legalized segregation in the Kansas City metropolitan area.

Several fundamental errors compel reversal of the district court's dismissal of the SSDs and HUD. I join Judge Arnold in his conclusion that the district court erroneously interpreted *Milliken v. Bradley* to require that each SSD have separately committed a constitutional violation with interdistrict effects before it could be included in an interdistrict remedy. Unlike Judge Arnold, I would hold that this error encompasses more than the housing violations claim but instead infects all of the district court's findings. Rather, I would hold that the district court erred in failing to find that the SSDs committed constitutional violations with continuing significant interdistrict effects. I would hold too that the district court erred in drawing the conclusion that the constitutional violations by the state and the KCMSD have no, or at most de minimis, continuing segregative effects on the SSDs, a finding that was falsely premised on the district court's misapplication of *Milliken* and on the district court's failure to adhere to the record as developed at trial.

The District Court's Misconstruction of *Milliken v. Bradley*

First, as discussed in Judge Arnold's opinion, the district court misconstrued *Milliken* when it concluded that *Milliken* precludes interdistrict relief in a racially segregated metropolitan area unless *each* school district is found to be a constitutional violator and by that violation to have caused a significant segregative effect in another district. As Judge Arnold notes, in its memorandum opin-

ion and order dismissing the SSDs the district court prefaced discussion of the plaintiffs' legal theories regarding SSD liability with the incorrect statement that "[t]he linchpin of an interdistrict case, as declared by the Supreme Court, is whether there has been a racially discriminatory act by *each* defendant that substantially caused segregation in another district."[4] *Jenkins v. State of Mo.*, No. 77-0420-CV-W-4, slip op. at 5-6 (W.D. Mo. June 5, 1984) (emphasis added), *citing Milliken*, 418

---

4. The district court's fundamental misconstruction of *Milliken* is illustrated by the following transcript excerpts of statements made by the district judge at trial:

> As I read *Milliken* and its progeny, the constitutional violation must have occurred in one of the suburban districts . . . . Now, that's *Milliken*, as I read it. And 80 percent of [the plaintiffs'] proof in this case so far would not comport with *Milliken*. Now, if I'm reading *Milliken* wrong, then I'm reading it wrong. Tr. 7342-43.
>
> But I was bound by law, as I read it [when dismissing the SSDs], that you cannot require an entity to be part of the [interdistrict] remedy unless you found a constitutional violation on the part of that entity * * *. Tr. 24,561-62.

In its June 5, 1984 opinion, the district court further stated:

> Because each defendant district is independent and autonomous from the state of Missouri, and from all other school districts, none has an affirmative duty to merge with other districts. None can be held vicariously liable for the acts of the state, federal government or other entities. And, absent a finding of an interdistrict constitutional violation, none can be made a part of an interdistrict remedy.
>
> * * *
>
> Instead, plaintiffs had to prove first that the segregated schools existing before 1954 were the direct and substantial cause of blacks leaving *each* defendant district; second, assuming that occurred, that it had a significant segregative effect in the KCMSD. *See*, 418 U.S. at 744-45; *Lee*, 639 F.2d at 1256 ("there must be clear proof of cause and effect and a careful delineation of the extent of the effect"). Plaintiffs' proof was weak, speculative and in any event *de minimus* [sic].

(Continued on following page)

U.S. at 745. The Supreme Court's precise language in *Milliken* differs significantly from this gloss by the district court and actually reads:

> [I]t must first be shown that there has been a constitutional violation *within one district* that produces a significant segregative effect *in another district*. Specifically, it must be shown that racially discriminatory acts of the state *or* local school districts, *or* of a single school district have been a substantial cause of interdistrict segregation.

Footnote continued—

> *Jenkins v. State of Mo.*, No. 77-0420-CV-W-4, slip op. at 12 (W.D. Mo. June 5, 1984).
>
> Even accepting Dr. Kain's conclusion that the present racial segregation is due to discrimination, Dr. Kain offered no evidence or opinions tending to show that any actions or inactions of any SSD contributed in any significant way to causing the racial residential separation he described. The Court finds that none of the SSDs did or failed to do anything which had any significant effect on residential patterns in the Kansas City SMSA. His testimony, therefore, does not support plaintiffs' claims for relief against the SSDs.
>
> *Jenkins*, June 5 opinion at 36.

Again, in an order issued in January, 1985, the district court stated:

> It would be very beneficial in the event the Eighth Circuit Court of Appeals were to reverse this Court's dismissal of the suburban districts. It would be useful in any effort undertaken to seek voluntary consolidation between any or all of the school districts. However, because of restrictions on this Court's remedial powers in restructuring the operations of local and state government entities, that portion of the KCMSD plan which would require the consolidation of eleven suburban school districts with KCMSD goes far beyond the nature and extent of the constitutional violation this Court found existed. *See*, Order filed September 17, 1984. This Court found that there was no unconstitutional action on the part of any of the eleven suburban school districts nor was there evidence of constitutional violations by those school districts which had any significant segrega-

(Continued on following page)

Milliken, 418 U.S. at 744-45 (emphasis added). The district court thus erected an improper proof burden for the plaintiffs to overcome. Ironically, that the district court's interpretation of *Milliken* has never been the legal standard by which grants of interdistrict relief have been measured was recognized even by the defendant State of Missouri, which correctly restated the *Milliken* standard in its brief on appeal to this court.[5]

Footnote continued—

tive effect within their own districts or on the KCMSD. *Milliken v. Bradley*, 418 U.S. 717, 745-48 (1974) (where respondents, alleging the Detroit school system was racially segregated, sought the creation of a unified school district as a remedy without a finding of constitutional violations by the suburban districts and without finding significant segregative effects). "The Supreme Court in *Hills v. Gautreaux*, [425 U.S. 284 (1976)] has interpreted *Milliken I* to mean that district courts may not restructure or coerce local governments or their subdivisions." *Liddell v. State of Missouri*, 731 F.2d 1294, 1308 (8th Cir. 1984). Clearly a plan which would require the consolidation of suburban school districts, ones in which no constitutional violation or significant segregative effect has been found, results in a restructuring and coercion of local government which is prohibited under *Milliken I*.

Jenkins v. State of Mo., No. 77-0420-CV-W-4, slip op. at 2 (W.D. Mo. January 25, 1985).

5. In its brief on appeal, the state notes:

Thus, in any case in which a state school system exhibits a large measure of local control, *Milliken I* requires that parties seeking an interdistrict remedy prove either (a) that the school district boundaries were manipulated for racial reasons or (b) that some intentionally discriminatory action by the governmental defendants—the State or the local school districts—was a "substantial cause" of "significant" current interdistrict segregation. *Id.*; *see Hills v. Gautreaux*, 425 U.S. 284, 294 & n.11 (1976) [*Hills*] (*Milliken I* requires demonstration of "significant" interdistrict segregative effects caused by unlawful governmental act); *Lee v. Lee County Board of Education*, 639 F.2d 1243, 1254-56 (5th Cir. 1981).

Brief of State Appellees/Cross-Appellants at 16.

In affirming the district court's incorrect interpretation of *Milliken*, the lead opinion ignores the established precedent of this circuit. In *Morrilton School Dist. No. 32 v. United States*, 606 F.2d 222, 228 (8th Cir. 1979) (en banc), *cert. denied*, 444 U.S. 1071 (1980), this court unanimously rejected a district court's similarly limited interpretation of *Milliken*. Although the lead opinion states that *Morrilton* was intended to be limited to cases involving gerrymandered school district lines, so narrow a view of the acts that may constitute constitutional violations and trigger interdistrict relief is unsupportable. In *Morrilton*, this court found that school districts which were not themselves found to be constitutional violators nevertheless could be included in interdistrict relief where the effects of the unconstitutional actions of another (in *Morrilton*, the state) were felt in those school districts. *Morrilton*, 606 F.2d at 228. Similarly, the holding in *United States v. Board of School Comm'rs.*, 573 F.2d 400, 410 (7th Cir.), *cert. denied sub nom.*, 439 U.S. 824 (1978) (cited in *Morrilton*, 606 F.2d at 228-29) affirms the appropriateness of granting interdistrict relief even absent separate constitutional violations by each school district, but nowhere limits relief only to cases where the school district is found to be dependent on the state and its boundaries established for segregative purposes. The lead opinion distorts what our earlier opinions have held in this regard.[6]

---

6. Judge Heaney, who authored the *Morrilton* opinion, now joins in this opinion's specific conclusion that *Morrilton* was never intended to be limited to gerrymandered boundaries. Moreover, this court's reliance in *Morrilton* on *Board of School Comm'rs.* clearly refutes the lead opinion's position. In *Morrilton*, we adopted wholly the language of the Seventh Circuit, which states:

[S]chool officials may not maintain that their districts should be excluded from any interdistrict remedy if they

(Continued on following page)

Again, in *Liddell v. State of Mo.*, 731 F.2d 1294 (8th Cir.) (en banc) (*Liddell VII*), *cert. denied*, 105 S. Ct. 82 (1984), we noted that in *Liddell v. Board of Educ.*, 667 F.2d 645 (8th Cir. 1981) (*Liddell III*)

> we rejected the State's argument that the district court was without authority to formulate an interdistrict plan without finding an interdistrict violation. We also noted that voluntary interdistrict pupil exchanges "must be viewed as a valid part of the attempt to fashion a workable remedy within the City."

Footnote continued—

> are found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. * * * If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its *instrumentalities* and which were the product of the violation.

Board of School Comm'rs., 373 F.2d at 410 (quoted in *Morrilton*, 606 F.2d at 228-29) (emphasis added) (citation omitted). The lead opinion attempts to distinguish this language from *Board of School Comm'rs.* by asserting that the school districts in that case were "mere instrumentalities of the state." *Ante* at 31. As grounds for its conclusion that the SSDs are "independent and their boundaries must be respected," the district court stated that "to find the SSDs vicariously liable for acts of the state, the Court must make the threshold determination that the SSDs are mere agents or arms of the state and not independent, locally autonomous entities." *Jenkins*, June 5 opinion at 101-02. *See also* id. at 8-14. Not only does the lead opinion's statement reflect the district court's misconstruction of *Milliken*, but it overlooks the fact than an SSD may have some attributes of autonomy and yet remain an instrumentality of the state.

In its June 5 opinion, the district court found that the SSDs had more attributes of autonomy than those Michigan school districts examined in *Milliken*. *Jenkins*, June 5 opinion at 8.

(Continued on following page)

> [*Liddell III*, 667 F.2d] at 651. In an order appended to that opinion, we noted that the State had been "judicially determined to be a pirmary constitutional violator," and we held that an interdistrict transfer plan would be salutary and would be entirely enforceable against the State. *Id.* at 659.

Liddell VII, 731 F.2d at 1303. *See Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 2926 (1986).

Footnote continued—

While it is true that the SSDs may have some authority to act independently, that authority is delegated to them by the state and the state retains ultimate authority over he SSDs' actions. The SSDs exist pursuant to provisions of the Missouri constitution, are maintained at the pleasure of the Missouri legislature, and are subject to the authority of state statutes and the rules and regulations of the Missouri State Board of Education. *See, e.g.*, Mo. Const. arts. III, § 40(20); IX. Evidence introduced at trial acknowledged the authority of the Missouri General Assembly to reorganize Missouri's schools for the purpose of achieving racial balance. *See, e.g.*, Plaintiffs' Exhibit 1010. The Missouri Supreme Court has found that school districts "form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally [e]ntrusted governmental function of imparting knowledge and intelligence to the youth of the state," *School Dist. v. School Dist.*, 102 S.W.2d 909, 910 (Mo. 1937), and that the school districts are statutory trustees for the discharge of the governmental function to apportion funds in the best interests of education which by the constitution is entrusted to the state, *School Dist. No. 59 v. Maple Grove School Dist. No. 56*, 359 S.W.2d 743, 747-48 (Mo. 1962) (citing *School Dist. v. School Dist.*). Moreover, the district court explicitly concluded in its September opinion that "none of the provisions of the Constitution nor statutes of the State of Missouri would have prevented the State of Missouri from fulfilling its affirmative duty of disestablishing a dual school system subsequent to 1954." *Jenkins v. State of Mo.*, 593 F. Supp. 1485, 1504 (W.D. Mo. 1984). The court further concluded that "[i]t is clear that school districts in the State exist pursuant to the State Constitution," *id.*, and that "[t]he State executive and its agencies as well as the State's General Assembly had and continue to have the constitutional obligation to affirmatively dismantle any system of de jure discrimination, root and branch," *id.* at 1505.

Though gerrymandering is certainly one type of constitutional violation, nothing in the lead opinion explains why it is the exclusive means by which a school district may suffer significant segregative effects for which interdistrict relief may be granted.[7] *See Evans v. Buchanan*, 416 F. Supp. 328, 340 (D. Del. 1976), *aff'd*, 555 F.2d 373 (3d Cir. 1977) (*Milliken's* "specification of the deliberate drawing of lines to achieve segregation was by way of example, not limitation").

The lead opinion's heavy reliance on *Lee v. Lee County Bd. of Educ.*, 639 F.2d 1243 (5th Cir. 1981), and *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324 (4th Cir. 1984), is also misplaced. *Goldsboro* is distin-

---

7. This court's line of cases interpreting and applying the *Milliken* standard to encompass a wide range of constitutional violations is consistent with Justice Stewart's restatement of the Supreme Court's holding in his concurring opinion in *Milliken*, in which he stated:

> Since the mere fact of different racial composition in contiguous districts does not itself imply or constitute a violation of the Equal Protection Clause *in the absence of a showing that such disparity was imposed, fostered, or encouraged* by the State or its political subdivisions, it follows that no interdistrict violation was shown in this case.

Milliken, 418 U.S. at 756 (Stewart, J., concurring) (emphasis added). Justice Stewart further emphasized that

> [t]he Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist. No record has been made in this case *showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity*, and it follows that the situation over which my dissenting Brothers express concern cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals.

Id. at 756 n.2 (emphasis added). Nowhere does Justice Stewart limit the definition of unconstitutional governmental activity solely to instances of gerrymandering.

guishable on several grounds. The Goldsboro city school district had been declared unitary by a federal district court in 1973. *See id.* at 325-26. Moreover, in *Goldsboro*, there was no showing of any housing violations or interdistrict transfers for segregated purposes, and on appeal the Fourth Circuit specifically found that the district court did not erronously apply the law to that case's facts. *See id.* at 328. Although *Lee* exhibits some similarities to the present case, as we noted in *Little Rock* the *Lee* case did not involve segregative interdistrict transfers, segregative boundary changes, or state-imposed residential segregation, and the city district had been previously declared unitary. *See Little Rock*, 778 F.2d at 429.

Missouri's History of De Jure Segregation

Significantly, the lead opinion omits any discussion of the State of Missouri's long history of de jure segregation in which the KCMSD and most, if not all, of the SSDs participated. Much of this history, which was recounted in *Liddell v. Board of Educ.*, 731 F.2d 1294 (8th Cir. 1984) (*Liddell VII*), is detailed in the district court's opinion granting intradistrict relief. *See Jenkins v. State of Mo.*, 593 F. Supp. 1485, 1490-95 (W.D. Mo. 1984). This history bears repeating here, however, because the nature and gravity of the constitutional violations for which plaintiffs seek redress can properly be evaluated only in light of their historical context.

The State of Missouri's implementation and enforcement of school segregation can be traced to well before the Civil War, when Missouri enacted laws prohibiting the creation of schools to teach blacks to read or write. Act of February 16, 1847, § 1, 1847 Mo. Laws 103. Beginning in 1865, the Missouri constitution expressly required separate

schools for blacks and whites. Mo. Const. 1865, art. IX, § 2. This provision was retained in three successive constitutions. Mo. Const. 1875, art. XI, § 3, *retained* Mo. Const. 1919, art. XI, §3, *revised and retained*, Mo. Const. 1945, art. IX, §§ 1(a) and 3(c). *See also* Act of February 17, 1865, § 13, 1865 Mo. Laws 170. In 1889, the Missouri legislature made it a criminal offense for a black child to attend a white school. Act of June 11, 1889, § 7051(a), 1889 Mo. Laws 226. Although a 1954 Attorney General opinion declared the school segregation laws unenforceable, the statutes implementing the constitutionally mandated segregation were not repealed until 1957, *see* Act of July 6, 1957, § 1, 1957 Mo. Laws 452, and the constitutional provision was not rescinded until 1976. *See Adams v. United States*, 620 F.2d 1277, 1280 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980).

Prior to 1954, school districts in Missouri were not even in compliance with the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896). From 1866 to 1929, state law exempted school districts from providing schools for black children if there were fewer than fifteen black children in the district and *required* them to discontinue black schools whenever average daily attendance fell below eight students. *See* 1865 Mo. Laws 177; 1869 Mo. Laws 86-87; 1870 Mo. Laws 149; 1887 Mo. Laws 264; 1893 Mo. Laws 247; 1909 Mo. Laws 790-91. In 1929, the Missouri legislature gave school districts the option to forego schools for blacks altogether, no matter how many black school children resided in the district. 1929 Mo. Laws 382. Although school districts refusing to provide schools for blacks within their district were required to make interdistrict arrangements for and pay the tuition of black elementary school children beginning in 1929 and for black high school

students beginning in 1931, the school districts were not required to fully reimburse transferred black students for transportation costs until 1945. *See* 1945 Mo. Laws 1700.

Rather than providing schools for blacks within their districts, school districts in the Kansas City metropolitan area, including the predecessor districts of the SSDs,[8] took full advantage of state law provisions allowing them to arrange for the transfer of black school children out of their districts. Blue Springs, Fort Osage, Center, Raytown, Grandview, and Hickman Mills provided no schools for blacks.[9] Lee's Summit did not operate any black schools after 1910. North Kansas City intermittently operated a black elementary school until 1944. Independence, Liberty,

---

8. Under Missouri law, the SSDs are legally responsible for the constitutional violations of their predecessor districts. *See Lewis County C-I School Dist. v. Normile*, 431 S.W.2d 118, 121 (Mo. 1968) (en banc); *McClure v. Princeton Re-organized School Dist.*, 307 S.W.2d 726, 727-28 (Mo. Ct. App. 1975); *Lynch v. Webb City School Dist. No. 92*, 373 S.W.2d 193, 200 (Mo. Ct. App. 1963). *See also Taylor v. Board of Educ.*, 294 F.2d 36, 38-39 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961) (school board at time of litigation held liable for the discriminatory acts of predecessor boards. Any reference to the conduct of an SSD therefore includes liability for any acts of its predecessors.

9. The district court found that four of the SSDs—Center, Raytown, Grandview, and Hickman Mills—did not operate dual school systems because they had no black residents prior to 1954. However, this finding is highly questionable, especially as to Raytown, Grandview, and Hickman Mills, in light of the school records and other evidence before the district court which showed the presence of at least some black children in their predecessor districts. In any event, that no black children may have lived in these districts prior to 1954 does not exculpate these districts. The great weight of evidence at trial indicated that the fact that there were no schools for black children to attend in these SSDs deterred blacks from moving to those districts in the first place. *See, e.g., Jenkins*, 593 F. Supp. at 1490; testimony of Dr. James D. Anderson, an expert in the field of the history of American education, summarized in Brief of Amicus Curiae The Kansas City Branch of The National Association for the Advancement of Colored People at 3-8.

and Park Hill each operated a black elementary school. Independence operated a black high school from approximately 1934 to 1945, and Liberty offered high school through the eleventh grade after 1938. However, the evidence is overwhelming that the quality of education available in these black schools was quite poor, especially in comparison to that available in the white schools in the SSDs and the black schools in KCMSD. Moreover, despite state laws requiring districts not operating black schools to reimburse black students for tuition and at least part of their transportation costs, none of the SSDs did so until Lee's Summit began reimbursement in 1931, followed by Independence in 1945, Park Hill and North Kansas City in the late 1940s, and Liberty in 1953. As the district court itself found, in 1954 KCMSD was the only school district in the Kansas City metropolitan area providing any real educational opportunities for blacks, operating fourteen black elementary schools, one black junior high vocational school and one black high school-junior college. *See Jenkins*, 593 F. Supp. at 1492.

Legalized segregation of and discrimination against blacks in Missouri was not limited to education. State law permitted local authorities to establish separate libraries, parks, and playgrounds for whites and blacks, Mo. Rev. Stat. § 165.377 (1959); made it a crime for a black to marry a white, Mo. Rev. Stat. § 563.240 (1959); and required segregation in colonies for the "feebleminded." *See, e.g., Jenkins*, 593 F. Supp. at 1503. Of foremost importance to this case is the pervasive system of housing segregation in which all levels of government participated. Racially restrictive covenants, FHA appraisal practices, relocation policies of state and local housing agencies, and private discrimination operated to restrict blacks to certain geographic sections of the Kansas City metropolitan area.

Housing Violations and HUD Liability

Judge Arnold's opinion recounts the long history of Missouri's involvement with housing discrimination in the Kansas City area, which in some instances continued through the 1970s. I join Judge Arnold in concluding that remand is required for further findings, for the purposes of fashioning interdistrict relief, on the extent of constitutional violations by the state and its various agencies in implementing segregative housing policies. For similar reasons, I would also reverse and remand for further consideration the district court's dismissal of HUD. Though the lead opinion affirms the district court's finding that HUD did not act arbitrarily or capriciously and that HUD's acts were without discriminatory intent or effect, the record makes clear that HUD committed numerous constitutional violations. As Judge Arnold points out:

> With regard to HUD, the District Court found that the agency had acted "reasonably" because it had taken action in the 1970s to end discriminatory practices by HAKC, whose programs HUD funded. 593 F. Supp. 1498-1499. Yet there was extensive evidence, not addressed by the District Court, that HUD knew of shortcomings in HAKC's tenant-assignment practices for years without taking action to end them.

Ante at 70 n.10. Use of the arbitrary and capricious standard is inappropriate in the context of HUD's alleged constitutional violations through the participation in and support of racially segregated housing practices. Where a government entity's discriminatory practices causes housing and population shifts with metropolitan-wide effects, an interdistrict remedy has been found an appropriate form of relief. *United States v. Board of School Comm'rs.*,

637 F.2d 1101, 1114 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980). Moreover, considering whether the participation of each SSD in the dual school system had any significant interdistrict effect, the district court concluded that for each SSD the proof of any current effects was "weak, speculative and in any event *de minimus* [sic]." *Jenkins*, June 5 opinion at 12. Because the district court erroneously assumed that *each* SSD must be found to have committed a constitutional violation with current segregative effects before it could be included in interdistrict relief, the district court did not properly take into account the current segregative effects on the SSDs of the state's or KCMSD's actions to maintain a dual school system in the Kansas City metropolitan area.

Milliken makes clear that an interdistrict remedy is justified if the constitutional violations of even "a single school district have been a substantial cause of interdistrict segregation." *Milliken*, 418 U.S. at 745. The Supreme Court denied interdistrict relief in *Milliken* simply because the plaintiffs had only shown that the constitutional violations of the Detroit public school system had *intra*district, not *inter*district, effects. *Id.* at 747 (explaining that dissent's position was that the existence of a dual school system in *Detroit* justified an interdistrict remedy); *id.* at 749 ("where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of surrounding districts."); *id.* at 751 ("Thus, there was no evidence suggesting that the State's activities * * * within Detroit affected the racial composition of the school population outside Detroit or, conversely, that the State's * * * activities within the outlying districts affected the racial

composition of the schools within Detroit."). In contrast, the plaintiffs here presented evidence showing that KCMSD's decision to operate some completely black schools and some completely white schools long after 1954 led to the rapid turnover of neighborhoods from black to white and caused many whites to move out of KCMSD to the SSDs. The district court repeatedly recognized that evidence at trial demonstrated the link between KCMSD's delay in implementing effective integration policies during the 1960s and 1970s and the exodus of whites from KCMSD during this period in discussing KCMSD's liability for segregation within KCMSD. *See Jenkins*, 593 F. Supp. at 1492-95. The district court did not consider KCMSD's conduct as a basis for ordering interdistrict relief, however, because it misconstrued *Milliken* to require culpability with continuing segregative effects on the part of each SSD before that SSD could be included in an interdistrict remedy. Because under *Milliken* the conduct of even a single school district may be the basis for interdistrict relief if the continuing effects of that conduct are interdistrict, I would require the district court to consider on remand the extent to which KCMSD's delay in implementing an effective integration policy has current interdistrict effects.

Ironically, though Judge Arnold concludes that the district court misapplied *Milliken* in assessing interdistrict effects from housing violations, he apparently upholds as not clearly erroneous the district court's findings of no constitutional violations by the SSDs and its findings of only de minimis continuing segregative effects on the SSDs from the state's and the KCMSD's operation of a dual school system. To this extent, I part company with

Judge Arnold.[10] These findings are inseparable from the district court's misunderstanding of the *Milliken* standard.

Constitutional Violations by the SSDs

The district court failed to analyze the housing violations by the state agencies because it believed they were irrelevant to the SSDs' participation in any interdistrict relief. Similarly, the district court failed to analyze the effect of the state's and the KCMSD's discriminatory practices because it decided their conduct was irrelevant to any remedial relief. The record is replete with evidence of constitutional violations by many of the SSDs and of the effect those violations had on all of the SSDs and on the KCMSD. As has already been stated here, these violations cannot be ignored by simply expressing deference to the district court's findings under the clearly erroneous rule. Whether there exists a constitutional violation is more a question of law than of fact and is clearly subject to *de novo* appellate review. *See, e.g., Bose Corp.*, 466 U.S. at 501 n.17 ("A finding of fact in some cases is inseparable from the principles through which it was deduced.").

Even under the district court's erroneous interpretation of *Milliken*, the lead opinion errs in affirming the district court's dismissal of the SSDs because it failed to find that the SSDs committed constitutional violations with cross-district effects. The uncontroverted evidence

10. This attempt to separate constitutional violations related to housing and the segregative policies of the various school districts ignores the district court's undisputed finding of the "inextricable connection between schools and housing." *Jenkins*, 593 F. Supp. at 1491. The constitutional violations here are so intertwined that it is impossible to separate the effects of one from another.

at trial showed that under the pre-1954 dual school system the SSDs exercised their discretion, granted them by the state, either to provide schools for black students which offered at best a substandard education or to decline to provide any schools at all. Instead, the SSDs transferred black students to the KCMSD. Understandably and undisputedly, KCMSD became the only school district in the Kansas City metropolitan area in which black school children could receive a complete education. Not only did the SSDs thus create segregated conditions in their individual districts by emptying their districts of all black school children, but they set historical precedent for interdistrict transfer of students on the basis of race in the Kansas City metropolitan area.

The district court's conclusion that the SSDs were local autonomous units[11] and therefore exempt from liability for any segregative acts done by the state is the major premise on which the lead opinion relies in affirming the district court's finding that the SSDs committed no acts with discriminatory intent that had significant segregative effects. However, to the extent the SSDs exhibited autonomy in deciding to provide inferior or no schools for blacks, under *Milliken* proof of autonomy here leads only to the conclusion that the SSDs did commit constitutional violations. Moreover, the lead opinion ignores the uncontradicted fact that after the SSDs participated in pre-1954 segregation on an interdistrict level, they took no affirmative steps on a similar interdistrict level to reverse the effects of those autonomously chosen educational practices. Even if *Milliken* required proof of

11. But see this dissent's footnote 6, *supra*, criticizing the lead opinion's conclusion that the SSDs are not instrumentalities of the State of Missouri.

constitutional violations by each individual SSD, which it does not, the district court erred in failing to draw the obvious inferences from the uncontroverted evidence to find such violations in the "autonomous" acts of the SSDs. The result today, as the evidence at trial showed, is that KCMSD's student body is sixty-eight percent black whereas the student population of the SSDs is only five percent black.[12]

Continuing Significant Interdistrict Effects

My most fundamental objection to the majority's position, however, is its wholesale affirmance of the district court's finding that to the extent any constitutional violations were committed by any of the defendants, the continuing segregative effects on the SSDs were de minimis and that inclusion of the SSDs in an interdistrict remedy was therefore precluded.

In concluding that the pre-1954 dual school system in which the SSDs participated has no continuing interdistrict effects, the district court found that despite the

---

12. Because Missouri mandated separate schools for blacks and whites until 1954, the current disparity between the percentage of blacks attending school in the SSDs and KCMSD should raise a rebuttable presumption that the de facto segregation that currently exists is the result of the prior constitutional violations. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971). The lead opinion argues that the *Swann* presumption that proof of prior de jure segregation coupled with a continuing racial imbalance establishes liability unless rebutted is inapplicable in interdistrict cases. To support this conclusion, the lead opinion notes that the Supreme Court did not apply the *Swann* presumption in *Milliken*. *Ante* at 24. Unlike this case, however, there was no allegation nor proof in *Milliken* that prior de jure segregation had interdistrict effects. In any event, even if the *Swann* presumption does not apply to interdistrict cases, the plaintiffs presented sufficient evidence that the constitutional violation of the SSDs have current interdistrict effects.

fact that only KCMSD provided blacks in the Kansas City metropolitan area with any real educational opportunities prior to 1954 as a direct result of the constitutional violations of the state, the KCMSD and the SSDs, those violations had but a de minimis effect on the housing choices of blacks prior to 1954. Such a finding is contrary to legal precedent, many of the district court's own factual findings, and the plaintiffs' unrebutted expert and lay witness testimony and is clearly erroneous.

In affirming as not clearly erroneous the district court's findings of de minimis continuing segregative effects on the SSDs from the KCMSD's actions, the lead opinion follows the district court in overlooking the weight of uncontradicted evidence in the record and the district court's own findings that the KCMSD's perpetuation of segregated schools within the KCMSD caused a mass concentration of blacks in an area where a substantial number of whites lived. This in turn resulted in displacement of whites, who moved to or transferred into the SSDs.

The evidence produced at trial demonstrated that by a variety of affirmative official acts, the KCMSD sought to preserve the all-white character of some of its schools at the expense of the schools in the southeast corridor of Kansas City. There, KCMSD followed a policy of "integration and stabilization." As part of this piecemeal desegregation policy, KCMSD implemented attendance zones, intact busing, liberal transfers, neighborhood school policies, and faculty transfers which had segregative instead of integrative effects. One of the most significant of these was the creation of shifting and optional attendance zones. Evidence at trial indicated that the attendance zone choices were based on Troost, a north/south street that traditionally had divided white neighborhoods

west of Troost from the neighborhoods to the east which also contained many whites but in which most of the blacks in Kansas City lived. Testimony at trial indicated that despite overcrowding in schools east of Troost and underuse of schools west of Troost, attendance zones did not traverse Troost until 1976. Moreover, testimony at trial established and the district court itself found that as the population of Kansas City changed in the years following *Brown v. Board of Educ.*, 349 U.S. 294 (1955), KCMSD "made frequent shifts in the attendance areas of its schools" with the result of removing white sections from the western-most portions of the racially transitional areas and attaching them to all-white zones further west, shifts which, coupled with a liberal transfer policy, "allowed attendance patterns to continue on a segregated basis." *Jenkins*, 593 F. Supp. at 1494. The district court also found that "as the black population expanded from the central city in a southeast direction, neighborhoods and schools experienced a racial transition. As blacks moved, or were bused to the schools in the [southeast] area, whites moved out." *Id.*[13] (citations omitted).

As a result of these policies, blacks were bused to or moved to the southeast area of Kansas City and whites moved to the neighboring SSDs. As the black population of Kansas City expanded to the southeast, KCMSD chose to operate some completely segregated schools and some integrated ones. The result of KCMSD's official school

13. Other examples of KCMSD's segregative policies include the transfer of its best and most experienced black teachers to white schools, leaving less capable teachers in black and changing schools and accelerating those schools' transition to all-black schools. Too, as the district court found, the liberal transfer policy allowed "whites living in racially transitional neighborhoods in Kansas City to transfer * * * to whiter schools." *Jenkins*, 593 F. Supp. at 1493.

policies was to make the KCMSD "blacker" and the SSDs "whiter," actions which have been found by courts before to be constitutional violations for which interdistrict relief is appropriate. *Cf. Hoots v. Pennsylvania*, 672 F.2d 1107, 1121 (3d Cir.), *cert. denied*, 459 U.S. 824 (1982) (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 266 (S.D. Ohio 1977), *aff'd*, 443 U.S. 449 (1979)) ("Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter.") (citation omitted). *See Evans v. Buchanan*, 393 F. Supp. 428, 436 and n.15 (D. Del. 1975) (presence of proportionately more black children in a city school than in the neighborhood served by the school likely encouraged white families to move to nearby suburbs, where "black students were barely present" in the school systems).

It is evident that the segregative policies perpetuated by KCMSD caused a greater concentration of blacks and black schools in the southeast corridor, directly resulting in displacing whites into the SSDs.[14] In this regard, the district court's own findings are at least contradictory and at most support the grant of interdistrict relief based on continuing effects in the SSDs from the KCMSD's policies. The district court recognized that the KCMSD had chosen to operate some completely segregated schools and some integrated ones in the district and that as of 1977, twenty-five one-race schools under the pre-1954 dual system remained ninety percent or more of the same race. *See Jenkins*, 593 F. Supp. at 1492. Moreover, in a supple-

14. The lead opinion asserts that this statement is an example of "appellate factfinding." To the contrary, this statement is based on the district court's own observations as to what actually occurred in the Kansas City metropolitan area due to institutional segregation. *See Jenkins*, 593 F. Supp. at 1493-94.

mental order, of which we take judicial notice, that enjoined for one year the property tax rollback provided under a Missouri statute, the district court summarized its findings in this case to date by stating:

> The Court has found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number of students leaving the schools of Kansas City and attending private schools and that it has caused a system wide reduction in student achievement in the schools of KCMSD. It has also found that by improving the quality of education in the KCMSD, it will enhance the appeal of the school system, thus giving it a chance to retain its present white enrollment and also encourage whites in private and suburban schools to enroll in its schools. As set forth in its order of June 14, 1985, the basic remedial principle in school desegregation cases, is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717 (1974).

Jenkins v. State of Mo., No. 77-0420-CV-W-4, slip. op. at 1-2 (W.D. Mo. August 25, 1986). Not only does this language further support the view that the district court *did* recognize that the effects on the SSDs from the segregative policies of the KCMSD were more than de minimis, but it illustrates that the district court's refusal to grant interdistrict relief was clearly erroneous and contradictory to its own findings from the record.[15]

---

15. It is conceivable that the district court found nothing inconsistent in so holding, because it labored throughout these proceedings under the miscomprehension that *Milliken* requires

(Continued on following page)

That the availability of schools influences housing choices is a common sense proposition. After a fifty-year period during which the SSDs provided no schools or inadequate schools for blacks, it is hardly surprising that black families living in the SSDs and those moving to the Kansas City area from other states chose to move to the KCMSD, where adequate educational facilities were available. As the district court notes in its opinion on intradistrict liability, the nexus between availability of schools and housing patterns has been recognized by the Supreme Court. *See Jenkins*, 593 F. Supp. at 1491 (quoting *Swann*, 402 U.S. at 20-21). This nexus has also been recognized by this court in the context of interdistrict cases. *See, e.g., Little Rock*, 778 F.2d at 412 n.5. The *Little Rock* case is particularly instructive in that, under facts very similar to this case, we upheld a district court finding that black families from other school districts were drawn to the Little Rock school district precisely because it was the only district that provided blacks in the area with substantial educational opportunities. *Id.* at 412. The district court's finding in *Little Rock* that school availability influences housing on an interdistrict as well as an intradistrict basis, which we upheld, seriously undermines the credibility of the district court's finding in this case "that the absence of black schools in any of the [SSDs] did not discourage black families

---

Footnote continued—

each individual SSD to be a constitutional violator. The lead opinion now urges that the August 25, 1986 opinion was merely a general order which does not contradict the district court's earlier, more lengthy orders. *Ante* at 25 n.17. This statement is at odds not only with the August order's plain language, but also with the objections to that August order made to this court by the SSDs on the grounds that the order was entered after the SSDs were no longer parties to the case and that its language was prejudicial to them.

outside (or from within) Missouri from moving to and living in those districts." *Jenkins,* June 5 opinion at 18 (citations omitted).

The district court's finding is further undermined by several statements in its September, 1984 opinion regarding intradistrict liability of the state and KCMSD. In rejecting the state's argument that job availability rather than school availability was responsible for the segregated housing and school patterns within the KCMSD, the district court stated that "[o]ften jobs would pull migrants to the city and then availability of schools would influence, more specifically, what housing choice would be made within the city." *Jenkins,* 593 F. Supp. at 1490. In finding that the current dual housing market affected blacks in the KCMSD, the court again referred to the "inextricable connection" between schools and housing. *Jenkins,* 593 F. Supp. at 1491. It is difficult to see how school availability would be an important factor in making housing choices within a single school district, but would not influence housing decisions within the metropolitan area in general.

In support of their argument that the constitutional violations here produced significant interdistrict effects, plaintiffs produced statistics showing that although the school population in the three-county area, excluding KCMSD, was between 7.19% and 8.7% black in 1881, the black school-aged population in the same area had steadily declined to between .39% and 1.5% by 1954. At the same time, the black population in KCMSD had risen from 8.8% in 1900 to 14.0% in 1954. Plaintiffs produced several expert witnesses on education and housing patterns who testified that the inability of blacks to provide their children with an education in the SSDs caused many black families to move to KCMSD, the only district providing any real educational opportunities for blacks in the Kansas City metropolitan area. The absence of schools for blacks in the SSDs, the experts testified, also influenced the housing choices of blacks moving into the Kansas City metropolitan area from other states, both because there would be less chain migration to the SSDs as the existing black population in the SSDs declined and because accessible education is an important factor for blacks, as for all people, in making housing choices. Plaintiffs also produced the testimony of many blacks who had lived in the SSDs prior to 1954 but had had to travel long distances or move to KCMSD itself to receive an education. Other evidence included pre-1954 school board reports and other documents stating that the absence of educational opportunities for blacks in rural areas caused by the dual school system was causing many black families to leave rural areas for large cities.[16]

Notwithstanding plaintiffs' extensive evidence, the district court concluded that the absence of educational opportunity for blacks in the SSDs prior to 1954 had a de minimis effect on current housing patterns and school segregation in the Kansas City metropolitan area. The lead opinion merely reasserts the district court's findings and concludes that they are not clearly erroneous. Close examination of the district court's opinion, however, reveals that its reasons for rejecting the plaintiffs' evidence as de minimis ring hollow. For example, the district court found that the increase in the black population in KCMSD prior to 1954 was attributable to jobs and employment opportunities available in the KCMSD area, rather than to the availability of schools. *Jenkins,* June 5 opinion at 15-16 and 18. No one disputes that economic opportunity

---

16. See *infra* note 18.

was a major factor in drawing blacks, especially from the South, to the Kansas City metropolitan area. The plaintiffs' argument, however, was not that school availability to the exclusion of economic opportunity drew blacks to KCMSD. Rather, plaintiffs argued that once blacks were drawn to the Kansas City area for whatever factors, including economics, school availability caused many blacks to settle in KCMSD rather than in the SSDs. This argument remains unrefuted, and in fact is substantiated by the district court's own findings regarding the nexus between school availability and housing patterns.[17] *See Jenkins*, 593 F. Supp. at 1491.

The district court also failed to assess the importance of the relative depopulation of blacks from the SSDs prior to 1954 with respect to the present racial composition of the Kansas City area. In rejecting the plaintiffs' evidence of depopulation, the district court noted that although the black population in the three-county area, excluding KCMSD, decreased by only approximately 837 from 1910 to 1960, the black population in KCMSD increased by more than 45,000 during this same period. Thus, the district court concluded, the impact of that movement on the black enumeration in KCMSD was insignificant. *Jenkins*, June 5 opinion at 15-16. The effect of the decline of the black

17. The court also erred in rejecting much of the plaintiffs otherwise uncontroverted expert testimony regarding the effect of defendants' constitutional violations on the residential choices of blacks in the Kansas City metropolitan area. Much of this testimony, given by Dr. James D. Anderson, a leading scholar and historian, was uncontradicted and based on interpretation of public records. *See supra* note 9. This evidence was highly probative, and it was wholly arbitrary for the court to reject it and inject its own inferences. Moreover, it is especially crucial in a case of this nature to give great consideration to the testimony of historical experts where the theory to be proved occurred long ago and few witnesses are alive to testify.

population living in the SSDs prior to 1954, however, is not limited to those black families that left the SSDs for KCMSD because of the lack of schools. Instead, as the plaintiffs' evidence demonstrated, the resulting lack of blacks in the SSDs in turn caused blacks moving to the Kansas City area from the South to live in the KCMSD, where there was a growing black population, rather than in the overwhelmingly white and hostile SSDs.

Not only did the district court improperly discredit the plaintiffs' evidence, it also omitted any reference to the evidence that most strongly supported plaintiffs' claims. For example, the plaintiffs submitted several reports prepared by the superintendent of public schools in Missouri during the 1920s and 1930s stating that the absence of black schools in rural areas was causing black families to migrate to the large cities.[18] Contemporaneous documents such as these, prepared by school officials at the time black depopulation of rural areas was occurring in Missouri, are highly probative of the link between school availability and housing patterns on an interdistrict basis. Although the district court recognized this link, *see Jenkins*, 593 F. Supp. at 1490 ("[u]ndeniably, some blacks moved to districts, including the KCMSD, that provided black schools"), it largely discounted the plain inferences to be drawn from it.

18. *See, e.g.*, 1929 Report of Missouri State Superintendent of Public Schools at 122-23 ("high school opportunity for [N]egro children is very limited" other than in St. Louis and Kansas City; "84 percent of all the high school education in the state" for blacks is provided in these cities although "less than half the [N]egro population in the state" lives there; in light of poor education for blacks in areas outside the cities, "the pronounced drift of the [N]egro population away from the farm to the city is quite understandable"); 1924 Report at 197 ("[m]any [blacks in rural areas] leave to seek better educational facilities for their children").

The district court rejected the plaintiffs' statistical evidence regarding the number of black students in the SSDs who transferred to KCMSD prior to 1954 as "de minimis." It is true that the number of transfers actually shown to have occurred during this period, anywhere from 251 to 600, appears small. These examples, however, were presented only as *representative* of the effects of the dual school system on school attendance and housing patterns in the Kansas City area, not as an exhaustive enumeration. The plaintiffs' inability to produce more accurate statistical evidence of interdistrict transfers is not surprising in light of the incentives to underreport black students and the conceded unavailability of interdistrict transfer records, for which the SSDs are at least partially responsible. The SSDs had an incentive to underreport the number of black school children in their districts because state law excused them from their duty to provide a school for blacks if the number of black school children in the district fell below a certain number. Black students from the SSDs had an incentive to be counted as residents of the KCMSD rather than as residents of the SSDs because they could thereby avoid paying tuition to attend KCMSD before the SSDs began to reimburse them for tuition in the 1930s and 1940s. It is difficult to imagine what level of statistical proof would satisfy the district court and the lead opinion. Evidently, they would be satisfied only if the plaintiffs had paraded before the district court every black student who had transferred from the SSDs to KCMSD or who had moved from the SSDs to KCMSD prior to 1954. Such a stringent level of proof has never been required. *See, e.g., Board of School Comm'rs.*, 637 F.2d at 1113-14.

Even assuming the numbers relied upon by the district court are accurate and controlling, it requires little

additional evidence to buttress the common sense proposition that blacks would be deterred from migrating to an overwhelmingly white school district where no black schools existed, where arbitrary policies or school transfers placed the primary burden of educational expenses on many black families, and where racial covenants prevented home purchases. To fail to acknowledge that blacks were deterred from living in the SSDs is to ignore the obvious. *Cf. International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 367 (1977) (in reversing denial of Title VII relief, the Supreme Court stated that to fail to account for non-applicants being deterred from even applying for employment would mean that "[v]ictims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful"). Perhaps most disturbing, however, is the district court's repeated reliance on the increasing black enrollment in the SSDs after 1954 as an indication that the prior constitutional violations of the SSDs have no current interdistrict segregative effects. The district court noted, for example, that black enrollment in Hickman Mills increased from twenty-nine black students in 1967 to 1,571 in 1983, and that black enrollment in Park Hill has increased by 110 students since 1976. *Jenkins*, June 5 opinion at 56, 88. That black enrollment in the SSDs has increased since the 1960s may indicate that barriers to black movement into the SSDs are declining over time. Far from indicating that there are no current significant segregative effects of the SSDs' past conduct, however, this increase in black enrollment in the SSDs since *Brown v. Board of Educ.* is conclusive evidence that the lack of schools for blacks in the SSDs prior to 1954 was a deterrent to blacks settling there. In light of the compelling evidence presented by the plaintiffs that the absence of

schools for blacks in the SSDs prior to 1954 had a significant effect on housing choices made by blacks during this time, the district court's conclusion that the effects were de minimis is clearly not supported by the record.

Affirmative Duty of State of Missouri, KCMSD, and the SSDs

It is clear that the SSDs, as well as the State of Missouri and KCMSD, have all failed to fulfill their affirmative duty under *Brown v. Board of Educ.* to eliminate the vestiges of their prior segregative policies and that significant interdistrict effects of these policies are still evident in the Kansas City metropolitan area. The district court, now affirmed by this court, held that because all of the SSDs had opened the doors of their all-white schools to blacks in 1960, the SSDs had discharged their duty under *Brown*. Courts have long recognized, however, that racially neutral policies are generally ineffective to counteract the continuing effects of past segregative practices, especially where such segregation has influenced housing patterns. *See, e.g., Swann,* 402 U.S. at 20-21; *Kemp v. Beasley,* 389 F.2d 178, 190 (8th Cir. 1968). The district court itself recognized the ineffectiveness of racially neutral policies after a long period of intentionally segregative policies in its opinion on intradistrict liability. *See Jenkins,* 593 F. Supp. at 1490-95. The reason such racially-neutral plans are ineffective is plain. A racially neutral policy, such as a neighborhood school policy, will simply not correct the effects of many years during which black schools were located in only certain parts of a school district, causing black families to settle in those areas. Similarly, to merely open to blacks the doors of schools in virtually all-white districts simply fails to eradicate

the effects of many years when those districts provided blacks with no schools or at best inadequate schools, causing black families already living in those districts to leave and discouraging black families newly moving into the area from settling in those districts. It is precisely because of this continuing affirmative duty under *Brown* that pre-1954 evidence is relevant.

Conclusion

The effects of the SSDs' pre-1954 constitutional violations and their continuing failure to fulfill their duty under *Brown* are still evident in the Kansas City metropolitan area today. Eighty-seven percent of the black students in the Kansas City metropolitan area are educated in KCMSD; eighty-nine percent of the white students attend school in one of the SSDs. Yet the district court concluded that the pre-1954 conduct of segregated schools and housing practiced by the SSDs did not significantly contribute to the current racial imbalance in the Kansas City metropolitan area. To support this conclusion, the district court noted that KCMSD was only 18.9 percent black in 1954-55. The fact that the major increase in the black population in KCMSD occurred after 1954, said the district court, is strong evidence that the current racial composition of the Kansas City area was caused by factors other than the pre-1954 dual school system. *See, e.g., Jenkins,* June 5 opinion at 41-42. Undeniably, many factors have contributed to the enormously disparate racial composition of the student bodies of KCMSD and the SSDs. Housing policies of federal, state, and local agencies have contributed to the dual housing market that exists in the Kansas City metropolitan area, which in turn has contributed to the de facto dual school system that exists

today. Ineffective integration policies of KCMSD during the 1960s and 1970s caused an exodus of whites from KCMSD to the SSDs.[19] The evidence at trial showed that the continuing influx of blacks to the Kansas City metropolitan area from the South and the higher birthrate among blacks have also contributed to the higher percentage of blacks in KCMSD. To the extent that these factors have magnified the effects on the SSDs of the pre-1954 conduct of state, the KCMSD and the SSDs and those effects have not been affirmatively addressed, all the defendants are at least partially to blame. Had the SSDs not contributed to the depopulation of blacks from those areas by failing to provide schools for blacks, the higher birthrate among blacks would have presumably also increased the percentage of blacks living in the SSDs. Similarly, had the SSDs' policies not contributed to the depopulation of blacks from those areas, more blacks moving into the Kansas City metropolitan area from the South would have settled in the SSDs rather than in KCMSD.

The lead opinion agrees with the state and the SSDs, who emphasize that the plaintiffs' case rests entirely on racial disparities, that proof of disparate impact on the SSDs is not enough to hold the SSDs liable and provide the basis of interdistrict relief. *See Columbus Bd. of Educ. v. Penick,* 443 U.S. 449 (1979). I have no quarrel with that premise. But as *Penick* recognizes, in *Swann*

---

19. The lead opinion's implication that interdistrict relief here would trigger white flight to Kansas, *ante* at 57, is irrelevant in determining whether interdistrict relief is appropriate. *See, e.g., United States v. Board of School Comm'rs.,* 503 F.2d 68, 80 (7th Cir. 1974) (Seventh Circuit reversed district court order for interdistrict relief, but found prediction of "white flight" an unacceptable reason for failing to desegregate schools).

intradistrict relief was premised on a presumption of continuing racial imbalance within a unitary district. *See Penick,* 443 U.S. at 400. Here the racial imbalance is clear evidence of continuing segregation following a pre-1954 de jure policy. It is not necessary to switch the burden of proof where there is overwhelming evidence of violations and effects throughout the system.

Moreover, the lead opinion is also incorrect in affirming the district court's reliance on the mere passage of time as exculpating the SSDs. The lapse of decades, without any showing of affirmative steps taken to reverse the invidious effects of de jure segregation, reinforces the broad scope of the effects of the defendants' constitutional violations here. Nor is the lead opinion correct in affirming the district court's rejection of the overall thrust of plaintiff's proof of interdistrict effects on the grounds that a series of de minimis violations cannot be aggregated to produce a finding of a constitutional violation. *See, e.g., Dayton Bd. of Educ. v. Brinkman,* 433 U.S. 406, 413 (1977). Here, neither the violations found proved by the district court nor the effects of those violations are insignificant. *See, e.g., Jenkins,* 593 F. Supp. at 1503 (finding that presence of dual schools had important segregative effects throughout the Kansas City metropolitan area). The premises on which the majority bases its affirmance of the district court's conclusion of de minimis continuing segregative effects on the SSDs have no basis in law nor in the facts as otherwise found by the district court and as developed at trial.

Although the lead opinion suggests to the contrary, this case differs notably from *Milliken* and this circuit's *Little Rock* case in that it does not present on appeal an issue of whether the only appropriate remedy is consoli-

dation of the entire metropolitan area's school districts.[20] The plaintiffs and the KCMSD seek alternative forms of interdistrict relief as well as consolidation as a means to achieve an integrated school system. And even if the requested relief includes consolidation, relief can be tailored by the district court itself or as directed by this court to fit the constitutional violations. As was true in the *Little Rock* case, the autonomy of the city and suburban school districts can be preserved concurrent with mandated interdistrict relief. As we stated in *Liddell VII*:

> [R]elating the remedy to the violation pursuant to *Milliken II* [443 U.S. 267 (1977)] does not require a finding that *each* educational program at issue has in the past been "infected with the discriminatory bias of a segregated school system." * * * It is sufficient to determine that the remedial program is directed to cure the general condition offending the Constitution.

Liddell VII, 731 F.2d at 1315-16 n.18 (citation omitted). The relief sought here is narrowly tailored to the particular situation and responsive to the Supreme Court's concern in *Milliken* that the "nature of the violation determine[s] the scope of the remedy." *Milliken*, 418 U.S. at 738 (citation omitted).

The quarrel I have with the intradistrict relief mandated by the district court, as modified by the lead opinion, is that the intradistrict programs will do little to integrate

---

20. As we observed in *Little Rock*, in *Milliken* it was proposed that the remedy include consolidation of one city district with fifty-three suburban districts in three counties where there was no evidence in the record indicating that the fifty-four districts were closely interrelated geographically, economically, politically or culturally as are the districts in this case. *Little Rock*, 778 F.2d at 429.

the metropolitan school system. The lead opinion calls for improved facilities and quality education programs, requires the state to pay its share of the cost of those programs, and authorizes the district court to order a tax increase if that alternative is necessary to enable the school district to bear its share of the cost of the mandated programs. This remedy is fine as far as it goes; however, it falls far short of the relief that should be required under the facts of this case.[21] It is hoped that at the very least the magnet school component and the voluntary interdistrict transfer plan, if implemented, will be of some help in integrating the district. In my view, however, these interdistrict programs should have been mandated already.

To summarize, I would hold that the district court erred in interpreting *Milliken v. Bradley*, 418 U.S. 717 (1974), to preclude interdistrict relief. Under *Milliken*, properly interpreted, the district court's own factual findings with regard to the constitutional violations of the state and KCMSD, especially with regard to the significant link between housing patterns and school availability in the Kansas City metropolitan area, strongly suggest that the plaintiffs are entitled to an interdistrict remedy. Because the district court clearly erred in finding that the SSDs committed no constitutional violations with continuing significant interdistrict effects, the district court's dismissal of the SSDs should be reversed and remanded for further proceedings. If on remand, after each of the SSDs have had an opportunity to present evidence, it remains unrebutted that the acts of the state, the KCMSD, or any of the

---

21. Although for the reasons stated herein we stand in dissent, we nonetheless agree with Judge Ross' statement as to the likely effects of refusal by the Kansas City metropolitan school districts to participate now or in the future in any cross-district programs.

SSDs have a continuing interdistrict effect, those SSDs which the district court determines to be within the violations' effects should be ordered to participate in an interdistrict remedy, such as a mandatory interdistrict transfer program, narrowly tailored to remedy the constitutional violations proved here.

The case should be reversed and remanded for reconsideration in light of *Milliken v. Bradley*, and the SSDs and HUD should be joined to determine the extent of their liability.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX F

ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SEPTEMBER 17, 1984

(Filed September 17, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

CRAIG JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

Originally, plaintiffs and the KCMSD filed this action jointly alleging various federal and state agencies and surrounding school district officials caused or contributed to cause the racial segregation existing in the metropolitan schools. In 1978 when the KCMSD was realigned as a defendant, plaintiffs made similar allegations against it, although there has been, during the course of this litigation, a "friendly adversary" relationship between them. (*See, e.g.*, stipulations of fact, filed February 21, 1984).

The KCMSD cross-claimed only against the state for its failure to eliminate the vestiges of its prior dual school system. For additional background, see this Court's orders of June 5 and July 16, 1984.

Jurisdiction is premised on 28 U.S.C. §§ 1331, 1343(3) and (4), 136, 2201 and 2202. Plaintiffs also allege claims under 42 U.S.C. §§ 1983 and 2000d and under the United States Constitution, 14th Amendment. Declaratory and injunctive relief was sought against all defendants.

After hearing the presentation of plaintiffs' evidence and before any defense, the Court dismissed the suburban school districts. Plaintiffs simply failed to show that those defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district. *Milliken v. Bradley,* 418 U.S. 717, 745 (1974). *See* order filed June 5, 1984.

HEW was also dismissed for plaintiffs' failure to prove the agency acted with racial animus or abused its discretion in the enforcement of Title VI. *See* order filed July 16, 1984. The KCMSD presented its cross-claim, Missouri and HUD defended, plaintiffs and the KCMSD rebutted, Missouri presented surrebuttal and, on the 92nd day of trial, the Court refused to hear sur-surrebuttal. Thus, on June 13, 1984, the evidence ended.

The claims addressed by this order are plaintiffs' claims against the KCMSD, the State of Missouri and HUD and the crossclaim of KCMSD against the State of Missouri. For the reasons that follow, the Court finds in favor of plaintiffs against the KCMSD and the State of Missouri; in favor of KCMSD against the State of Missouri; and against plaintiffs and in favor of HUD.

THEORIES AND DEFENSES

Plaintiffs allege, and Missouri has admitted, it mandated racially segregated schools before 1954. It is plaintiffs' position that after 1954 Missouri failed to take affirmative steps to eliminate the vestiges of its prior dual school system. In fact, plaintiffs argue, Missouri acted to perpetuate racial segregation by enforcing restrictive covenants and other unfair housing practices, by discriminatorily relocating blacks who were displaced by highway development and urban renewal, and by supporting racially-identifiable interdistrict arrangements (e.g. vocational and special education area schools).

Against the KCMSD, plaintiffs claim district officials adopted ineffective policies to change the segregative patterns that were developed or developing. In an exculpatory allegation plaintiffs allege the KCMSD could not balance the racial population of students in its district due to impaction of minorities, white flight, housing policies of other agencies and "other factors beyond the capacity of that district to manage." (Amended complaint, May 18, 1979 ¶ 20).

Regarding HUD, plaintiffs allege the agency abrogated its affirmative duty to prevent and reduce racial segregation and instead intentionally increased segregation by failing to consider racial isolation in its site location for low income projects and locating most of the projects within the KCMSD; establishing express guidelines before 1948 requiring racial segregation and permitting such practices after that date; funding local housing agencies which did not prevent segregation in their policies or practices; and providing funds and insurance to suburban areas where access to blacks was restricted. These policies and

practices, plaintiffs claim, racially impacted the KCMSD schools.

In its cross-claim against Missouri[1] the District alleges the State has not fulfilled its constitutional obligation to take action to dismantle its prior dual school system and is primarily liable for the existing segregation in the KCMSD. Not only has Missouri failed to take necessary remedial measures to eliminate past segregation but the District charges the state has acted to perpetuate segregation. To the extent the Court might find the KCMSD to be internally segregated, the District alleges the State is largely responsible for such a condition and should be required to contribute financially to any remedial plan the Court might order as relief against the KCMSD. Further, the District charges the State has caused a high concentration of economically and socially disadvantaged minority students within its boundaries, a condition which increased student expenses and decreased the District's tax base. Concomitantly, the KCMSD alleges the State's actions or omissions caused the surrounding districts to be predominantly white.

For relief, therefore, the KCMSD seeks a court order requiring the State to propose and assist (financially and otherwise) in the implementation of a plan which will eradicate any vestiges of the State's past dual school system which includes the racially identifiable character of the KCMSD and the surrounding suburban districts.

Plaintiffs claim the only effective way to "protect and preserve" the constitutional rights of plaintiffs is to judi-

1. The collective designation of "Missouri" or "State" is intended to include the governor, the Missouri State Board of Education and its officers, and Arthur L. Mallory, the state Commissioner of Education.

cially mandate the "reassignment of students among all districts in the metropolitan area and/or to realign or reconstitute the defendant school districts," with compensatory payments made by the State to fund the reconstituted districts. (Plaintiffs' amended complaint, May 18, 1979 ¶ 25). Plaintiffs request defendants submit a plan to eliminate the racial identifiability of the KCMSD and other school districts in the metropolitan area. To facilitate adoption of such a plan, plaintiffs seek to enjoin federal agencies from funding state and local entities until the plan is submitted. Plaintiffs seek declaratory and injunctive relief against the federal defendants and statements from all defendants on their future plans to reduce and eradicate segregative conditions.

Missouri has argued in defense that it has met its affirmative duty to the extent of its statutory power and that local entities have the sole authority to effect the changes plaintiffs seek, e.g. redrawing district lines. Moreover, Missouri charges the racial isolation that exists is not vestiges but is the product of resegregation from natural demographic trends. Finally, Missouri argues the Kansas City area is typical of cities nationwide that had no dual school system; therefore the racial patterns cannot be attributed to the State's past conduct.

Procedurally, Missouri argues that plaintiffs and the KCMSD pleaded only interdistrict claims and seek only interdistrict relief, which claims were denied by this Court's order dismissing the suburban school districts. The Court disagrees. In its order of June 1, 1981, the Court addressed both the inter and intra-district claims raised by the KCMSD's cross-claim. Neither plaintiffs nor the KCMSD's pleadings are defective in this regard. In any event, and contrary to Missouri's allegations, plaintiffs moved to

amend their complaint to conform to their contention interrogatories (filed October 17, 1983 Doc. No. 351). The Court deferred ruling the motion preferring to address the contentions individually as they arose during the trial. (Tr. 35). Insofar as plaintiffs' evidence (adopted by the KCMSD Tr. 17,275) stated intradistrict claims, the motion is hereby granted.

On February 21, 1984, plaintiffs and the KCMSD entered into a stipulation of fact which the Court holds is only binding between them; however, the stipulations will be controlling, unless otherwise stated by the Court, regarding the racial composition and enrollment in the District past and present, its 1955 through 1977 "desegregation" plans, its transfer policy, the Havighurst and Hazlett reports and faculty composition. The District stipulated, *inter alia*, that before 1977 it was not a unitary district or in compliance with federal regulations. (*See, also,* Tr. 24). Nor does the District contest the HEW findings of noncompliance. It does state, however, contrary to plaintiffs' contentions, that it did not operate with discriminatory *intent* after 1954.

HUD argues in defense that it does not select the sites for low income projects and that said projects are dispersed throughout the metropolitan area in any event. HUD also maintains it does not relocate people, but merely monitors the relocation activities of other agencies and has made adjustments where necessary. Regarding FHA, the government insists there are no vestiges of its past practices and moreover that FHA's involvement in the context of all housing transactions is *de minimis*. HUD concludes it has not abused its discretion and that plaintiff's evidence fails to show a causal link between schools and HUD's activities.

FINDINGS OF FACT

The State admitted, and the Court judicially noticed that Missouri mandated segregated schools for black and white children before 1954. *See* Mo. Const. Art. IX, Section 1(a) (1945) (rescinded 1976) *and* §§ 163.130, 165.117 R.S. Mo. (repealed 1957). These provisions were not immediately and formally abrogated after the *Brown* decision was announced; however, the State's Attorney General issued an Opinion in 1954 declaring them unenforceable. (P. Ex. 2232). The statutes were repealed in 1957 and the constitutional provision was finally rescinded in 1976. This historical background is recounted in more detail by the courts in *Adams v. United States,* 620 F.2d 1277, 1280-81 (8th Cir.), *cert. denied,* 449 U.S. 826 (1980); and *United States v. Missouri,* 363 F.Supp. 739, 746-47 (E.D. Mo. 1973) *aff'd* 515 F.2d 1365 (8th Cir.) *cert. denied,* 423 U.S. 951 (1975).

Each school district in Missouri participated in this dual school system before it was declared unconstitutional in *Brown I.* Districts with an insufficient number of blacks to maintain the state-required separate school made interdistrict arrangements to educate those children. Undeniably, some blacks moved to districts, including the KCMSD, that provided black schools. (Tr. 2043, 4557-59). As the Court previously noted, however, this movement was insignificant when compared to the total black enrollment in the KCMSD. (Tr. 1773, D. Ex. K2). Accordingly, no interdistrict constitutional violation by any suburban school district was shown. (*See* order filed June 5, 1984).

Dr. James Anderson, plaintiffs' expert historian, opined the black migration into Kansas City was from a depopulation of blacks in the surrounding three-county area mov-

ing to the city primarily for schools. In its opinion of June 5, the Court rejected Dr. Anderson's opinions as contrary to the weight of the evidence and as being without sufficient foundation. The Court finds the greatest influx of blacks came from southern and border states and that they migrated because of a host of factors.

This in-migration coupled with a high birth rate (Tr. 16,509-510) resulted in the Kansas City black population doubling from 41,574 in 1940 to 83,740 in 1960. (*Id.*)

Before 1954, access to schools was one of many reasons some blacks chose to move into the KCMSD. (Tr. 16,688, 14,793-94, 16,691-93, 16,835). Economics and job opportunities were also major factors in black migration. (Tr. 595, 600, 676-78, 713, 796, 911, 914, 1052, 1089, 1103, 1111, 1163, 1307, 1312, 1318, 1552, 1579-80, 1680-81, 1728, 2781, 3214, 3267, 18,527, 18,550, 16,842). Often jobs would pull migrants to the city and then availability of schools would influence, more specifically, what housing choice would be made within the city. (Tr. 16,688).

Dr. John Kain, plaintiffs' expert on the determinants of residential location, predicted dispersed racial residential patterns would exist in Kansas City if race were not a factor in housing choices. (Tr. 7515-7529). Dr. Kain used three indicators to predict housing choice: income, type of family, and whether there were school-aged children. (Tr. 7489, P. Ex. 1265 series). His conclusion was that absent housing discrimination blacks would be dispersed throughout the metropolitan area. (Tr. 7719, P. Ex. 1265G). Dr. Kain discounted or rejected other factors such as job location, ethnic clustering and personal preference. (Tr. 7473-76, 7846). The Court disagrees to the extent Dr. Kain rejected the possible influence of other factors in his analysis.

The intensity of segregation is demonstrated by the fact that the average black family lives in a census tract that is 85% black while the average white family lives in a census tract that is 99% white. (Tr. 14,739, 14,745). Regardless of their motivation for coming, once here, blacks settled in the inner city or, the "principal black contiguous area." (Tr. 10,837-38, 10,847-49). Plaintiffs' witnesses blame this black concentration (and ensuing white flight from it) on the dual school system, the enforcement of restrictive covenants, site and tenant selection policies for low income housing and other government practices and policies as well as on private discrimination. (Tr. 12,974, 12,976, 13,024, 13,032-13,035, 13,040-41, 13,043, 13,046-47, 13,058-62, and 13,123-24).

Not surprisingly, Missouri defended with experts whose opinions declared economics, accessibility to jobs, spacial barriers, personal preference and private discrimination were the factors affecting black movement. (Tr. 19,102, 19,104-05). They all discounted or totally rejected schools and the dual school system as having any effect. (Tr. 18,620-24, 18,627-28). To the extent those experts deny the influence of schools in housing patterns, particularly in the context of Missouri's legacy, their opinions are rejected.

The Court finds the dual housing market (Tr. 12,974-76), which still exists to a large degree today (Tr. 12,008-09, 12,339), impacted blacks in the KCMSD and consequently caused the public schools to swell in black enrollment. The Court finds there is an inextricable connection between schools and housing. "People gravitate toward school facilities, just as schools are located in response to the needs of the people. The location of schools may thus influence the patterns of residential development

of a metropolitan area and have important impact on composition of inner city neighborhoods," *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 20-21 (1971).

There were many witnesses called and literally weeks of testimony concerning the cause of blacks settling in the inner city of Kansas City and within the KCMSD. This testimony was relevant as to the suburban school districts and HUD. It was not relevant on the claims of plaintiffs against the KCMSD and the State of Missouri because those defendants had an obligation to the black students regardless of why they settled in the school district. As will hereafter be pointed out, the Kansas City District school system had never been totally integrated. In *Davis v. East Baton Rouge Parish School Bd.*, 721 F.2d 1425 (5th Cir. 1983), the school board tried to justify its one-race schools on the basis that they resulted from demographic patterns for which the school officials had no responsibility. The Court held that the Board's argument failed, stating:

> The Board's reliance on housing patterns as justification for the continued existence of one-race schools is not only factually but legally unsound. . . .
>
> Until it has achieved the greatest degree of desegregation possible under the circumstances, the Board bears the continuing duty to do all in its power to eradicate the vestiges of the dual system. That duty includes the responsibility to adjust for demographic patterns and changes that predate the advent of a unitary system. [citations omitted]. The racial isolation of some schools, whether existing before or developing during the desegregation effort, may render disestablishment of certain one-race schools difficult or even impossible. Until all reasonable steps have been taken to eliminate remaining one-race schools, however, ethnic housing patterns are but an important factor to be considered in determining what further desegregation can reasonably be achieved; they do not work to relieve the Board of its constitutional responsibilities.

Davis, 721 F.2d at 1435. The Court, therefore, will focus on the anatomy of the KCMSD.

Plaintiffs allege the KCMSD could have done more than it did to stably integrate its schools. (Tr. 14,892-93). Plaintiffs are quick to point out, however, that the District was faced with a pervasive system of segregation and would more than likely end up "resegregated" like all major cities. *Id.*

The Court notes that several witnesses used the term "resegregated" when describing racial change in the schools and housing patterns, usually changing from predominantly white to predominantly black. That may be correct terminology in the context of their testimony but the Court finds it has no legal significance. A segregated District cannot become resegregated until it is first integrated. The KCMSD has not yet become integrated on a system-wide basis.

As a consequence of their failure to do more, plaintiffs allege there are lingering effects of the dual school system. The District also blames the prior dual system for its present status, maintaining the State did nothing to relieve the conditions it created. Several witnesses confirmed the conclusion reached by the Supreme Court in *Brown I* that forced segregation ruins attitudes and is

inherently unequal: "[Segregation] may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. (Tr. 16,414, 16,416, 16,422). The general attitude of inferiority among blacks (Tr. 1,920-21) produces low achievement (Tr. 16,573) which ultimately limits employment opportunities and causes poverty. (Tr. 2,453-56, 16,414, 16,457-58). While it may be true that poverty results in low achievement regardless of race, (Tr. 16,508), it is undeniable that most poverty-level families are black. (Tr. 16,422). The District stipulated that as of 1977 they had not eliminated all the vestiges of the prior dual system. (Stipulation introduction filed 2/21/84). The Court finds the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District.

Racial Composition of the School District: In the 1954-55 school year, 18.9% of the District's 63,487 students were black (stipulation 2, Def. Ex. K-2). Because the State compelled separate schools for blacks, the District established and maintained segregated facilities with segregated staffs. In 1954, the KCMSD operated 90 schools of which 14 elementary, 1 junior-high vocational school and 1 high school-junior college were for black students. (Stipulation 5, Def. Ex. K-2). Those schools were located in the black-concentrated areas (Stipulation 6) and as that community expanded in a southeast direction so did the black schools. (P. Ex. 20, 740, 741, 742 map series, 1653; Tr. 3,577-78, 12,990-92).

The white students in the District during this period attended one of the 62 elementary schools, 3 junior high schools, eight high schools (1 with a vocational school) or the junior college. (Stipulation 10, Def. Ex. K2).

The KCMSD was majority white in enrollment until 1970 (Def. Ex. K-2, Tr. 17,009), and could have achieved a mathematical racial balance in its schools until that year. (Tr. 17,010-12). Instead, the District chose to operate some completely segregated schools and some integrated ones. (Def. Ex. K-2). Regardless of some school officials' feelings that a more mathematically oriented plan would be less stable (Tr. 17,205-207), the District's chosen path was ineffective in integrating its school system.

As of 1977, 25 one-race schools under the pre-1954 system remained 90% or more of the same race. (Def. Ex. K54, Stipulation 85, 86; Tr. 16,980). In addition, there were four black schools from the dual system that were still predominantly black when they closed in 1968. (Tr. 16,999-17,001). In summary, as of 1974, 20 years after *Brown I*, 39 schools were more than 90% black; another 38 had 10 to 90% black enrollment. Eighty percent of all blacks in the District attended schools that were 90% black; only 19% of the blacks attended a school that was 10 to 90% black. (Stipulation 84).

With the adoption of Plan 6C (discussed *infra*) in 1977, the District eliminated the 16 entirely white schools and reduced the number of 90+% black schools to 28. (Tr. 16,567). During the 1983-84 year, no school had less than 30% black enrollment; 24 schools however are racially isolated with 90+% black enrollment. (Tr. 16,568, Def. Ex. K-2). The Court finds the District did not and has not entirely dismantled the dual school system. Vestiges of that dual system still remain.

Liberal Transfers. During the pre-1954 days, the District utilized a liberal transfer policy within each system, (Stipulation 11), allowing students to transfer to any

open (uncrowded) school. (Stipulation 23, 24, 56; Tr. 16,940). Blacks did not use the liberal transfer policy as frequently as whites. (Tr. 2,010, 3,544; Stipulation 61). The Court finds the liberal transfer policy was not adopted or maintained to foster segregation even though it allowed whites living in racially transitional neighborhoods to transfer within the District to whiter schools. (Stipulation 57, Tr. 16,941-42).

Critics of the transfer policy blame its liberality for the racial turnover in schools by not compelling whites in that attendance area to attend that school. (Tr. 6,604-05; Stipulation 50, 56; P. Ex. 2780). Others, however, attribute the policy with fostering stabilization in transitional neighborhoods, slowing white flight and thus aiding integration. (Stipulation 56; Tr. 3,025-26, 13,663-64).

In the years following *Brown*, the District attempted to accommodate varying views regarding the effect of the transfer policy. (Stipulation 58, 59, 60, 61 and 62) and made adjustments in both the liberality and review of the proposed transfers. (Tr. 16,556-57). When the District proposed abandoning the liberal transfer policy in order to satisfy federal OCR officials and retain federal funds, an integrated neighborhood organization sought to enjoin the abandonment fearing it would produce more white flight. (Tr. 13,662-64). The District did however revoke the policy pursuant to OCR directives. (Tr. 13,667). In 1973, race was considered in transfer requests, giving preference to transfers that would promote integration. (Tr. 13,738). The Court finds the evolution of the transfer policy was not motivated by racial animus.

Neighborhood Schools: In response to the *Brown II* decision in 1955, the District adopted an assignment system known as the neighborhood school plan. (Stipulation 12,

13). Pursuant to this plan, the separate racial zones were eliminated and attendance areas were drawn around each school based on the buildings' capacity, distances involved, and other factors like safety, transportation and terrain. *Id.* By calculating the number of students in each attendance area, the District projected enrollment and expected racial composition for its various schools. Contrary to its predictions, many of the previously black schools opened with more than 92.5% black enrollment; 921 whites were predicted at these schools yet only 117 were present during the official census taken that fall. (Stipulation 22). White enrollment in the District decreased by approximately 1,200 between 1954-55 and 1955-56. *Id.* (P. Ex. 582, 584, 584B, 585, 586, 740, 743, 744). Because most of the schools were in racially segregated neighborhoods before 1954, the Court finds adoption of the neighborhood school concept did not substantially change the segregated school system.

Attendance Zones: Following *Brown*, the District made frequent shifts in the attendance areas of elementary and secondary schools as the population shifted, depending upon the capacity of various buildings. (Tr. 3,028; Stipulation 16 through 20, 29 through 31, 34, 37, 41, 43, and 48). In June, 1963, the District's proposed attendance zone changes were challenged by a group of residents who charged the changes would resegregate the schools and neighborhoods. (Stipulation 49). The Board in response, modified its plans and adopted a policy statement recognizing that integration was an important factor to be considered in the District's decisions. (Stipulation 50 through 52). Nevertheless, the attendance zone changes did not achieve system-wide integration.

In addition to the regular attendance zones, various "optional" zones were utilized to allow students in those

areas to choose among several schools. (Stipulation 31, 34, 51). Many of those optional zones existed before 1954, (*see* P. Ex. 739, 740; maps) and continued thereafter. (Stipulation 34). Regardless of the intent, e.g. to relieve overcrowding, (Tr. 2,011-13, 16,937-38), the Court finds the use of these optional zones, coupled with the liberal transfer policy, did not aid to integrate the District; to the contrary, it allowed attendance patterns to continue on a segregated basis.

Intact Busing: From the mid-1950's through the 1970's the District was faced with overcrowded conditions. (Tr. 16,948-49; 6,583, 6,548-49, 7,305-06). Besides adjustments to attendance zones, in the mid-1960's, the District also adopted a busing program. The Board declared that the busing program was not for integration but was required to relieve overcrowded conditions at some schools. (Stipulation 53). While the Board added it would aid integration when possible, it chose to bus entire classrooms of black students to predominantly white schools but to keep them as an insular group, not allowing them to be mixed with the receiving population. (Tr. 7146-47, 8,612). In the face of civil rights protests, in 1965, the bused students were integrated into the regular enrollment. The Court finds the District's use of intact busing had a segregative intent and effect. Because the practice was stopped in the 1960's, however, no continuing violation exists. Certainly black children subjected to that experience well remember the feelings of isolation and inferiority obviously produced by the practice.

Middle School: In 1965, a bond issue was passed to build three new schools in order to relieve the overcrowding in the Central area. (Stipulation 63). Because local civil rights groups protested the proposed site locations

as being segregative and ineffective to relieve overcrowding, the District hired a consultant, Dr. Havighurst, to make a report and recommendation for the new sites. (Stipulation 64). His final report proposed, *inter alia*, a middle school at the Paseo and Brush Creek to stabilize a transitional neighborhood and retain its integrated character. (Stipulation 64, 67). After 1 1/2 years of debate, the Board rejected this portion of Dr. Havighurst's recommendations stating there was a lack of funds and it did not appear that integration could be maintained. (Stipulation 67). Some blacks viewed the District's failure to adopt the middle school as a step toward continuing the segregated school conditions. (Tr. 3017-20). The Court finds that reasonable minds could differ as to the effect and ability of the middle school to help integrate. (Tr. 16,478-79).

Concepts for Changing Times: At the instance of several community and civil rights groups, Superintendent Hazlett, in 1968, presented a document "Concepts for Changing Times," in which various proposals for district-wide integration and stabilization were suggested. (P. Ex. 414, 414A, 2603; Stipulation 69). The Board appointed a bi-racial committee (committee of 30) to study the "Concepts" and make recommendations. The Committee generally endorsed the ideas (P. Ex. 414E through K, 2780U and V) however, the Board never voted on the proposals and none were otherwise acted upon. (Stipulation 69). In fact there was no district-wide desegregation plan adopted by the KCMSD until Plan 6C was implemented in 1977-78). *Id.*

As indicated *supra*, as the black population expanded from the central city in a southeast direction, neighborhoods and schools experienced a racial transition. As

blacks moved, or were bused to the schools, in the area, whites moved out. (Tr. 8715-16, 8721-30, 9228-32, 9235). Several community groups attempted unsuccessfully, to maintain an integrated neighborhood and stabilize the often rapid transition. (Tr. 9,347-48, 9,395-96, 13,631-32).

In 1965, the Kansas City Commission on Human Relations issued proposals to stabilize the southeast area. (Stipulation 70). Many of which were adopted by the KCMSD. Racial turnover continued unabated, however, with the efforts proving to be little more than a thumb in the dike. (Stipulation 71).

It is interesting to note that in the 1958-59 school year there were 52,491 white students in KCMSD. It had 14,952 black students which comprised 22.5% of the total enrollment. The highest enrollment in the past 30 years occurred in 1967-68 when there was a total enrollment of 74,997 students. The largest enrollment of blacks occurred in the 1971-72 school year when there was a total of 35,620 black students enrolled. In the 1983-84 school year the total enrollment in the KCMSD was 36,650 students, 10,022 whites and 24,803 blacks with a percentage of 67.7% black. The total enrollment from 1967-68 to 1983-84 has been reduced more than 50%. Enrollment of whites between 1958-59 and 1983-84 has been reduced by 80%. The black enrollment from 1971-72 to 1983-84 has been reduced by approximately 30%.

Plaintiffs contend that the State establish a system of area vocational schools that effectively segregated students on the basis of their race and that the methods of funding these schools were racially discriminatory. The Court addressed this issue in its June 5 order dismissing the suburban defendants.

The Kansas City Technical Center is an AVTS for all high schools in KCMSD. It was the first AVTS formed in the Kansas City area. It served all students in the KCMSD regardless of race. There is no proof that the formation of this school has prolonged or contributed to the segregation in the schools in the KCMSD. DESE administers vocational educational funds without regard to race and all districts are treated alike. (Tr. 17,939).

The State has been of some aid to school districts in the State which have segregation problems. When a Missouri school district received an OCR complaint, the DESE sent a letter to the district offering the department's assistance. (Tr. 17,464). A Technical Assistance Unit (TAU) was established, funded by federal funds, which provides assistance to school districts involved in voluntary or court ordered desegregation upon a district's request. (Tr. 17,-667). It also notifies the eligible districts of other services which can be provided under the conditions of the federal grants. The TAU proposal for funding to the federal government explicitly names St. Louis and Kansas City school districts as priority areas for technical assistance. (Tr. 17,684). KCMSD has requested and been provided TAU assistance. (Tr. 17,682, 17,785; St. Def. Ex. M-2).

The DESE also provides valuable assistance to urban school districts through its Urban Education Section. (Tr. 17,592-604).

Claims Against HUD

Plaintiffs have made numerous claims that the Department of Housing and Urban Development (HUD) violated its responsibilities under the Fifth Amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, Title VIII of the Civil

Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*, and the applicable housing laws and regulations.

Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d provides "no person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VIII, 42 U.S.C. § 3601 (known as the Fair Housing Act) declares that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." The Act contains a number of detailed provisions banning discrimination on the basis of race, color, religion, sex or national origin in the sale or rental of housing, the financing of housing and the provision of brokerage services. *See,* 42 U.S.C. §§ 3604, 3605, 3606. The Act further makes it unlawful to interfere with any person's exercise of enjoyment of these rights. 42 U.S.C. § 3617.

Before analyzing some of the myriad claims made by plaintiffs it may be helpful to briefly summarize the basic goals of the federal housing programs. The United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437J, was originally enacted to remedy the unsafe and unsanitary housing conditions and the acute shortage of housing for families of low income. It authorized HUD to make loans and annual contributions to local public housing agencies (PHAs) to develop, operate and maintain low rent public housing projects for families with low income. 42 U.S.C. § 1437B-C. Congress sought to achieve this goal by vesting the responsibilities of the administration of these housing programs in local housing agencies.

Under the 1934 Act, FHA guaranteed or insured payment of residential mortgage loans for those of low income

who qualified, making it possible for low income people to purchase homes with very low down payments and interest rates below the national average. In 1954 the Act was amended under 12 U.S.C. § 1751(d)(3) and (4) to provide mortgage insurance to developers, including public bodies, of multi-family rental or cooperating housing for moderate income or displaced families. The Housing Act was again amended in 1959, 12 U.S.C. § 1751(v) to make mortgage insurance available to facilitate the financing of rental housing for the elderly or handicapped.

The Act was amended in 1974 by the Housing and Community Act of 1974 which had as part of its objectives the elimination of slums and the renewal of older urban areas. 42 U.S.C. § 5301. It specifically recognized that the concentration of persons of low income in the central cities was creating social, economic and environmental problems. In 1977, 42 U.S.C. § 1439 was amended to place greater emphasis on local housing assistance plans. The primary goal of the federal housing program is to provide decent housing for the poor; however, its secondary concern is to develop and maintain stable, desirable urban communities.

The § 235 program [12 U.S.C. § 1715(z) 1968] combined mortgage insurance with HUD mortgage subsidy payments to the lender in amounts determined by the buyer's income. The § 236 program was authorized in 1968, 12 U.S.C. § 1715(z)(1). In addition to mortgage insurance HUD provided interest subsidies to nonprofit, limited dividend or cooperative programs to reduce interest rates to an extremely low level.

Section 8, 42 U.S.C. § 1437(f), (Housing and Community Development Act of 1974) provided for rental subsidies to lower income persons by payments directly from HUD to landlords including public bodies. Under

§ 8 the rental subsidy is tied to the tenant not to the property. In other words the § 8 certificates are HUD's guarantee of the rental subsidy. The tenants are responsible for finding their own housing although the administering housing authority may be able to direct the certificate holder to landlords who had indicated a desire to have § 8 tenants. If the prospective landlord does not agree to participate in the program, the tenant must take the certificate somewhere else or forego the subsidy. Also if the certificate holder moves from one qualified apartment to another, the lessee takes the certificate along.

Scope of Judicial Review

Plaintiffs have not alleged nor have they met the statutory prerequisites for filing a private action under Title VI, § 2000d *et seq.*, nor under Title VIII, 42 U.S.C. §§ 3610 or 3612, requiring such complaint to be filed within 180 days of the alleged discrimination.

Plaintiffs have properly proceeded on the basis that HUD has violated their rights to "the equal protection of the laws" as guaranteed by the Fifth Amendment of the United States Constitution. *Davis v. Passman*, 442 U.S. 228 (1979), *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

The standard of review for HUD's actions are the same as those for HEW which were set forth in this Court's order of July 16, 1984 (pp. 21 and 22). Briefly, there must be a showing that in administering the federal housing programs in the Kansas City area its actions were arbitrary and capricious, without a rational basis, it did so with discriminatory intent or purpose, and there is a causal connection between the violation and the injury, the segregated schools in the KCMSD. *City of Memphis*

v. Greene, 451 U.S. 100, 119 (1981); *Washington v. Davis*, 426 U.S. 229, 239-241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Aschuker v. Dept. of Housing and Urban Development*, 686 F.2d 472 (7th Cir. 1982); *Clients Council v. Pierce*, 711 F.2d 406 (8th Cir. 1983). Discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

Plaintiffs claim that FHA's appraisal practices prior to 1949, and even thereafter, contributed to segregated housing in the Kansas City area. Clearly, FHA's appraisal manuals for 1936 (P. Ex. 1303) and 1938 indicated racial restrictive covenants would tend to insure a stable community thus enhancing the value of the property. In 1947 and thereafter emphasis was placed on such considerations as to whether there was a probability of a change in occupancy, that in a change from one user group to another the successor group exhibits a lower income level. The manual also pointed out that a neighborhood would probably remain more stable where there was compatibility among the neighborhood occupants. (P. Ex. 1305). By 1947 reference to racial restrictive covenants was deleted from its manual and it has refused to insure the mortgage on any property which contained such restrictions. Insurance of mortgages by FHA incurs a risk of loss of federal funds. Racial restrictive covenants were intended to cause housing segregation. While such covenants were brought about by private action they were enforced by the courts of Missouri until after the case of *Shelley v. Kraemer*, 334 U.S. 1 was decided in 1948. Even though such covenants were discriminatory without a doubt they

did have an effect on the market value of residential property. FHA did not enforce the covenants; however, it accepted the fact that Missouri courts did enforce them. FHA was faced with this reality and could not ignore it in making a determination as to the maximum risk which should be incurred with funds of a federal agency. In view of this FHA did not act arbitrarily nor capriciously in giving these covenants consideration in arriving at an appraisal. As demonstrated by Ex. P. 22, the areas most affected by these covenants soon were occupied by blacks after the covenants were no longer enforceable. There was no evidence showing the number of FHA insured mortgages in the restricted areas.

Prior to 1950 FHA insured approximately 15,000 homes in the KCMSD. (Ex. FD37A). Between 1950 and 1980 there were in excess of 2,000,000 housing turnovers in this area. If FHA's appraisal practices prior to 1950 had any effect on present racial housing patterns, it would, at most, be *de minimis*.

Plaintiffs claim that HUD violated its Title VI and VIII obligations when it continued to fund the Kansas City Land Clearance for Redevelopment Authority (LCRA) after it knew that the LCRA was following racially discriminatory practices. In 1953 the LCRA was established by Kansas City, Missouri to administer urban renewal programs under the Housing Act of 1949. HUD provided federal funds to assist in urban renewal and neighborhood development activities. (Ex. FD204C). After receiving the complaint that LCRA was practicing racial discrimination in its relocation activities, HUD made a Title VI complaint investigation. In that investigation HUD found that blacks were being located primarily in the southeast part of Kansas City while whites were relocated throughout the

Kansas City area. (P. Ex. 2913A). As a result of the Title VI investigation, LCRA was required immediately to cease such discriminating practices and to file reports with HUD so that HUD could monitor their referrals. The reports were to be filed with HUD every 90 days (Ex. P2913A). LCRA failed to file its reports in a timely fashion. (Tr. 11,601). The reports that were filed showed no significant improvements in LCRA's referral practices. As a result in June, 1973, HUD refused to fund the 1974 Neighborhood Development Program (NDP) unless the city assumed the responsibility for all relocation services. (Ex. FD204C). In June, 1973, HUD, LCRA and the City of Kansas City entered into a cooperation agreement by which the City assumed the responsibility for relocation under the urban renewal and neighborhood development plan. As part of this agreement each relocatee was to receive at least one referral outside of the "inner city." (Ex. FD239). The cooperation agreement required the City to file reports at least twice a month with reports to include the race of each displaced person, the number of dependents and the address of housing referrals. (Ex. FD239). Following this agreement, approximately 1/3 of the housing referrals provided to black relocatees were outside of the inner city area. (Ex. P322A, Tr. 10,991). The relocation reports show that between 1971 and 1976 only 174 black households were relocated during the six year period. (Ex. P622B). The Court finds that in working out the cooperation agreement between the LCRA and the City of Kansas City, Missouri, HUD acted in a reasonable and responsive manner. To have cut off funds would have penalized those most in need of housing, that is the people of low income, and could not have been done absent a lengthy Title VI investigation. The Court finds that by entering into the cooperation agreement between HUD,

LCRA and the City of Kansas City, their actions were not arbitrary or capricious and did not violate plaintiffs' fifth amendment rights.

Title VIII. Plaintiffs contend that within the KCMSD, § 8 certificate holders are segregated by race. The Housing Authority of Kansas City (HAKC) administers the § 8 assistance program in Kansas City, Missouri in which HUD provides housing assistance payments to HAKC for § 8 participating tenants. (Tr. 12,197, 12,364). HAKC's § 8 program presently has 1,458 certificates in use with 16% white and 84% nonwhite. (Ex. P1481B). There are public housing authorities administering the § 8 assistance housing programs in Independence, Liberty and Lee's Summit, Missouri. These PHA's presently have 619 certificates in use with the racial composition 98% white and 2% nonwhite. (Ex. P1481A). By the nature of the § 8 program, participants may request a certificate from any issuing jurisdiction and then locate housing of their own choosing within the jurisdiction issuing the certificate. (Tr. 20,455). There was no evidence that HUD or the PHAs attempted to direct § 8 certificate holders as to the location of the housing which they chose.

Under the Public Housing Act of 1949, P.L. 81-171, 63 Stat. 413, Congress recognized that the problem of providing decent housing for low income families was "clearly related and practically inseparable from the problem of clearing urban slums." In other words, the 1949 Act created a slum clearance program. Congress provided loans and capital grants to clear the land and then make it available for redevelopment in accordance with locally devised plans for the area. This was reaffirmed by Congress in the 1954 Housing Act, P.L. 83-560, 68 Stat. 590. The urban renewal projects were required to be located in

areas for which the community had a plan for both slum clearance and redevelopment. HAKC has nine projects for family occupancy under management containing a total of 2,270 units. (Ex. P1609). HAKC constructed seven family projects between 1952 and 1963 all either within the model cities or urban renewal areas. (Ex. P2917). The Housing Authority had two other family projects containing 50 units each consisting of single family homes located throughout Kansas City, Missouri. (Ex. P1609).

At the outset HAKC followed the "freedom of choice plan." In 1968 HAKC adopted a new assignment plan in accordance with HUD regulations which required applicants to select a suitable vacant unit from among the three development locations with the highest vacancy rate or be removed to the bottom of the waiting list. (Ex. P1596FFF). In 1976 HUD made a Title VI investigation of HAKC's assignment practices. It found that HAKC was allowing applicants to choose a suitable vacant unit in any development rather than giving a choice only of a unit among the three developments with the highest vacancy rate (Ex. P1596FFF). Following the investigation, HAKC and HUD entered into a compliance agreement in which HAKC adopted a new tenant assignment policy. This policy required that applicants be assigned to suitable units at one of the three developments with the highest vacancy rate. In addition it provided for a minority preference housing option. This feature of the plan allowed for the immediate placement of any applicant or transfer of any resident to a development in which the applicants or tenants racial group comprised 33 1/3% or less of the development's population. (Tr. 12,225, Ex. P1596GGG). The Court finds that the location of the public housing was in accordance with

the congressional acts and that HUD's monitoring of the program was neither arbitrary nor capricious and that the compliance agreement entered into between HAKC and HUD was reasonable.

Plaintiffs also contend that HUD assisted multi-family housing caused the overwhelming majority of these units to be located within the KCMSD. The Court finds that HUD followed a balanced housing policy and attempted to insure that assisted housing located in the inner city area was balanced by assisted housing projects in the suburban areas. (Tr. 20,657). HUD reviewed all proposals for multi-family housing projects to include racial characteristics of the project area. (Tr. 20,408-09). HUD had disapproved some proposed projects because they were located in areas of minority concentration. (Tr. 20,563-68). The evidence indicates that there has not been a lack of balance between federally assisted housing within the KCMSD and the suburban areas. Plaintiffs' Exhibit 27B reflects that there were 6,832 HUD insured or subsidized multi-family units within KCMSD and 9,872 such units in the 11 suburban school districts (which have been dismissed in this action). This indicates that HUD did follow a balanced housing policy. HUD published site selection regulations known as "Project Selection Criteria", 24 C.F.R. § 200.700 *et seq*. Without setting forth the criteria, they were sufficient to enable HUD to make a reasonable determination that a particular project was in compliance with Titles VI and VIII. There was no evidence in the case that the practices of HUD in site selection and approval for federally subsidized multi-family housing had a substantial effect upon the racial makeup of schools within the KCMSD. A good example is the East Hills Village lo-

cated in the Knotts Elementary School attendance zone. The East Hills Village project was approved by HUD in 1971. (Ex. P27B). In 1971 when the project was approved by HUD, Knotts School was 84% black and in 1973 when the East Hills Village project was opened, Knotts School was 91.9% black. (Ex. K-2). When East Hills Village opened there were 30 elementary school age children, 27 black and 3 white. (Ex. P1199). Ten percent of the children were white, ninety percent were black. The black percentage was higher in Knotts School than that reflected in the East Hills Village project.

Although the evidence showed that HUD assisted housing was not concentrated within KCMSD, plaintiffs nevertheless asserted that most blacks who resided in assisted housing lived within the KCMSD. Even assuming that this is true, it does not show a Title VIII violation on the part of HUD. HUD established affirmative marketing regulations, 24 C.F.R. §§ 200.600, 841.202 and 880.206, and the evidence reflects that the Kansas City HUD office monitored these affirmative fair housing and marketing plans very closely. A detailed description of HUD's review and monitoring of the affirmative fair housing marketing plans was provided by Elaine Owens. (Tr. 20,413-431; 20,516-521). Each project sponsor was required to establish an "anticipated occupancy goal" for tenants which was both realistic for the project area and which would provide greater integration than the current racial mix of the area. (Tr. 20,419, 20,516-17). The review also assured that advertising and contact with the community groups were adequate to reach persons who would not otherwise be expected to apply for such housing. (Tr. 20,415-19). Its review involved a pre-occupancy conference with the sponsor to discuss the

provisions of each marketing plan and how the plan was to be implemented as well as an appraisal of the sponsor's past affirmative marketing experience. (Tr. 20,420-23). With respect to HUD's monitoring of the plans, sponsors were required to submit monthly occupancy reports until the project was 95% occupied. Thereafter, occupancy reports were to be submitted annually. (Tr. 20,423-24). HUD also monitored the Equal Housing Opportunity Plans under § 8 housing programs. (Tr. 20,431-33). Generally its efforts were designed to insure that participating § 8 certificate holders were made aware what affordable housing was available to them throughout the entire community and that the public housing authorities informed them of their rights under the fair housing laws. HUD made annual monitoring visits to all PHAs in the Kansas City area that administered § 8 programs. (Tr. 20,453-54). Undoubtedly the affirmative fair housing marketing plans did not result in the integration which HUD desired; however, this was not the result of the lack of affirmative marketing efforts. A good example was the evidence concerning Parvin Estates which was located in predominantly white north Kansas City. (Tr. 12,542-43). Mrs. Ruth Sechter testified at length concerning the marketing plans imposed in the development of Parvin Estates. She stated that the plan had been successful in making blacks aware of the openings at Parvin Estates but they were unsuccessful in attracting the expected number of black families to the project. She attributed this to reasons that were beyond the sponsor's control and not the fault of the plan. (Tr. 12,582). This project contained 300 units; however in spite of the affirmative marketing efforts, they were never able to attract more than 12% minorities. The occupancy rate for blacks was actually lower. (Tr. 12,562). Certainly there was nothing about the marketing

regulations or the manner in which they were implemented and monitored which was arbitrary or capricious.

Plaintiffs also asserted that blacks were routinely denied FHA mortgage insurance well past 1954. There was no evidence whatsoever to support plaintiffs' contentions in this regard. Mr. Newsome, with 23 years experience as a real estate agent, was not aware of a single instance in which FHA had refused to insure a mortgage loan because of race. (Tr. 9,439, 9,517). The only evidence on the issue was to the effect that race was not a factor in HUD's decision to insure a home mortgage loan. (Tr. 19,925-26, Treu Depo. at 60; James Depo. at 15). Since 1962 FHA has required a certification of compliance with its nondiscrimination policy by all lenders, buyers and sellers. (Ex. FD45A & B, 46A & B, and 350 [see 24 C.F.R. § 200.300 *et seq.*]).

Plaintiffs also claimed that there was racial discrimination in the sale of homes in which the FHA insured mortgage had been foreclosed. Plaintiffs maintain that many management brokers maintained separate lists of these homes, one for whites and one for blacks, and presold homes in white areas to whites to avoid the possible purchase by blacks. The evidence reflected only one instance in which this occurred. Ms. Dorothy Davis testified that in 1966 Mr. Homer Ritch, a management broker agreed to sell property to her several days before it was advertised to the general public. (Tr. 11,730). HUD investigated Mr. Ritch's conduct which resulted in an official reprimand by HUD and a nonrenewal of his contract to manage HUD properties. (Tr. 11,746). HUD immediately altered the manner in which such homes were sold to prevent any future occurrences of preselling. (Tr. 11,732-33). Under the new procedure, all proposals for the sale of HUD owned properties had to be submitted

directly to HUD not to management brokers and no proposals were received until the Monday following the Thursday advertisement of the property. (Tr. 11,732-33). The most detailed evidence concerning HUD's property disposition was in the deposition testimony of Jaspar Levine, the Director of HUD's property disposition branch between 1965 and 1979. Summarily, he testified that HUD maintained the property in good condition so that they would not blight the neighborhoods. (Levine Depo. at 26). When title to the property was acquired by HUD, a repair list was prepared, contracts were let for the repair, and the repair work was performed. (Levine Depo. at 27, 31). If property remained unsold for a period of 30 to 60 days, it was normally taken off the market, further repaired and re-advertised for sale. (Levine Depo. at 28). Homes that needed only minor repairs were offered for sale in an "as is" condition. (Levine Depo. at 26). The evidence showed that HUD held properties were available for sale to all members of the general public regardless of race. (Tr. 11,726, Levine Depo. at 79). Properties held for sale were advertised in the Kansas City Call, a black newspaper, and the Kansas City Star and Times. (Tr. 11,726-27). A list of HUD held homes that were ready for sale was regularly mailed to all interested persons. (Tr. 11,727). The evidence does not support plaintiffs' contention that HUD's practices in the sale of homes on which its insured mortgages had been foreclosed was racially discriminatory.

There was evidence that some HUD held homes in the Southeast Corridor were allowed to deteriorate and fall in disrepair. Assuming the accuracy of this testimony there was an absence of any evidence to support a finding that such neglect of the property by HUD was because of racially discriminatory intent or purpose.

Various State Agencies

Plaintiffs contend that the following state agencies had an opportunity to reduce the impaction of blacks and minorities in the inner city of Kansas City: the Missouri Housing Development Commission, the Division of Finance, Division of Savings and Loan Supervision, the Division of Insurance, the Missouri Real Estate Commission, and the Missouri Commission on Human Rights. In view of this Court's finding that the State had an obligation under the fourteenth amendment to assure that blacks within the KCMSD were not denied the equal protection of the laws regardless of why they settled within the KCMSD, the evidence concerning the aforementioned state agencies will be addressed only very briefly

Plaintiffs contend that the State and particularly the Missouri Department of Highway and Transportation (MDHT) have managed its relocation program for persons displaced by highway projects in a manner that had a racially segregative effect. Their main complaint was the location of the I-70 route which was first chosen in 1956 when the interstate system took effect (Tr. 18,243) and at a time when the KCMSD was overwhelmingly white. (Def. Ex. K-2). I-70 was financed by both federal and state funds (Tr. 18,243). I-70 generally followed the route of what was previously U.S. Route 40 (Tr. 18,248) and was chosen to serve the existing traffic patterns as they then existed and were anticipated to continue. The I-70 project had to be approved by the Federal Highway Administration. (Tr. 18,246). Planning for this project was generally approved by various agencies of the city government. (Tr. 18,246-47). It goes without saying that the location of a highway and particularly an interstate

highway through a residential area will displace a certain number of residents in that area. There is no proof whatever that the State's action as it related to the construction of the I-70 project amounted to any constitutional violation.

Plaintiffs contend that in its relocation program for the South Midtown Freeway (SMF), MDHT managed its program in a manner which resulted with blacks who were displaced being located in areas which were predominantly black and the whites being located in suburban areas which were predominantly white. The Court finds that the location for the SMF generally followed existing patterns of traffic and was probably the most feasible and reasonable location for the freeway and insofar as the freeway location was concerned, there was no constitutional violation on the part of the State. (Tr. 18,258). Again, the plans for the freeway had to be approved by the federal government. (Tr. 18,298). It was necessary for a relocation plan to be prepared and submitted to the U.S. Department of Transportation for approval for funding. (Tr. 18,032-33). Relocatees who requested assistance from MDHT were assisted in finding replacement housing. (Tr. 18,028). Relocation payments were authorized by the Uniform Relocation Act of 1970. (Tr. 18,019). On the initial contact, the relocatees completed a questionnaire which included the relocatee's preference for relocation. (Tr. 18,019-20). The relocatees did receive financial assistance dependent upon their circumstances. (Tr. 18,021-27). Relocatees were told to contact MDHT if at any time they felt they were the victims of discrimination but no such complaints were ever received by MDHT. (Tr. 18,031, 18,043). Generally, MDHT advised relocatees of the availability of houses and did

not refer them to realtors for this purpose. (Tr. 18,032, 18,041, 18,042).

The State contended that plaintiffs' claims that the State's location of highways and its management of its relocation programs were racially discriminatory should have been dismissed and no evidence on these issued admitted because the United States Department of Transportation was dismissed and the Highway Department for the State of Missouri was not a party. Without deciding the issue as to whether these claims should have been dismissed, the Court finds that there was nothing in the location of the highways nor in the operation of the MDHT's relocation program which amounted to a constitutional violation and for which the State of Missouri would be liable.

Plaintiffs claim that the State through the Missouri Housing Development Commission (MHDC) engaged in the implementation of federal housing programs which contributed to the creation and perpetuation of a dual housing market in the metropolitan Kansas City area. MHDC was created by the Missouri legislature in 1969 to provide loans to middle and low income persons. (Tr. 18,306-07). MHDC does not build or manage any developments but simply provides financing. (Tr. 18,307).

Its first financial commitment was on December 15, 1971 which was for three developments including Parvin Estates located in the North Kansas City Missouri School District. (Tr. 18,309). MHDC funds come from a sale of tax exempt bonds which provide the necessary proceeds for making loans to developers or in the case of single family programs to individuals to purchase mortgages under the single family home loan program. (Tr. 18,310-11). MHDC received no federal funding but has

been requested to administer certain section 8 housing assistance contracts and as a result receives funding directly from HUD in which MHDC acts as a conduit to distribute these funds to eligible mortgagors who in turn make principal and interest payments to MHDC. (Tr. 18,310-13). Nearly all projects in which MHDC participated are federally insured, either FHA or VA, and in some instances private mortgage insurance guarantees. (Tr. 18,315). There was considerable evidence concerning the type of federally insured projects in which MHDC was involved; however, the Court sees no particular advantage in reviewing those projects in detail. State Exh. C-12 reflects the projects in which MHDC was involved and the location of those projects. It clearly appears that the majority of the units in which it was involved were located outside the KCMSD.

Plaintiffs and the KCMSD offered evidence of the alleged past racially discriminatory practices of private individuals in the fields of real estate, residential and commercial, financing, insurance and public accommodations. They seek to hold the state responsible for these activities because real estate brokers, banks, savings and loan institutions, insurance companies and other entities claimed to have been engaged in this practice receive licenses from and are subject to regulation by the State of Missouri. There is no doubt that private entities did engage in discriminatory practices such as red lining, steering and blockbusting. As stated the discriminatory acts were committed by private individuals or entities. The only complaint involving illegal activities of realtors which was filed with the Missouri Real Estate Commission led to the permanent revocation of the real estate license of the agent involved. (Tr. 12,257-58). Other

complaints were filed with the Kansas City Human Relations Committee which did receive an affirmative response from that committee. (Tr. 4721 and 4711-12). The mere fact that activities of these private individuals or entities were either licensed by or subject to regulation by a state agency does not convert the private action into state action for which the State of Missouri would be liable. However, private action may, in law, become state action when the state has exercised coercive power or has provided significant encouragement for the private discriminatory activity. This is clearly the teaching of the following cases without any further discussion concerning the holding in those cases: *Moosehead Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.E.2d 627 (1972); *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 LE2d 534 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 I.E2d 418 (1982). There was no evidence whatsoever that the state agencies exercised coercive power or significantly encouraged the private individuals or entities in their discriminatory practices so as to make their actions the actions of the State. While these agencies, acting within the authority granted them by the General Assembly, committed no constitutional violation, the State could have given those agencies obligations and authority which could have aided in the disestablishment of the dual school system which it created. This Court cannot say what precise course the State should have taken at any particular stage in meeting its affirmative duty to disestablish the dual system; however, by acting through these agencies, it could have at least partially met that duty. A finding that none of the aforementioned agencies committed any constitutional violation entitling plaintiffs to relief does not dispose of the question concerning the State's liability.

In the past the State has taken positive actions which were discriminatory against blacks. As previously stated, it mandated separate schools for blacks and whites; it established separate institutions for teaching black school teachers, § 10632 R.S. Mo. (1939); it established and maintained a separate institution for higher education for blacks at Lincoln University, § 175.050 R.S. Mo. (1949); it provided that school boards in any town, city or consolidated school district could establish separate libraries, public parks and playgrounds for blacks and whites, § 165.327, R.S. Mo. (1959); it made it a crime for a person of 1/8 Negro blood to marry a white person, § 563.240 R.S. Mo. (1959); and its courts enforced racially restrictive covenants. These actions had the effect of placing the State's imprimatur on racial discrimination. It created an atmosphere in which the private white individuals could justify their bias and prejudice against blacks. A large percentage of whites do not want blacks to reside in their neighborhood and a large percentage of blacks do not want to reside within a neighborhood in which they are not wanted. This has and continues to have a significant effect on the dual housing market in the Kansas City area. Thus, the Court finds that the State has encouraged racial discrimination by private individuals in the real estate, banking and insurance industries. Liability on the part of the State might be a very close question if it hinged solely on its encouragement of private discrimination. There is a much more salient reason for finding liability on the part of the State.

The KCMSD did not mandate separate schools for blacks and whites. The people of the State of Missouri through constitutional provision and the General Assembly through legislative enactments mandated that all

schools for blacks and whites in this State were to be separate. There is no room for doubt but what the State of Missouri intentionally created the dual school system. Under *Brown I, Brown v. Board of Education*, 347 U.S. 483, (1954), this constituted a violation of the 14th amendment of the United States Constitution and no further proof of segregative intent is required. *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), *Swann v. Charlotte-Mechlenburg Bd. of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Green v. School Board of New Kent Co.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984) and other cases decided by the Supreme Court and the various circuit courts clearly demonstrate that having created a dual system, the State and the KCMSD had and continue to have an obligation to disestablish that system. In *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), the Court stated:

> [W]e have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) (*Brown II*).

Keyes, 413 U.S. at 200. In *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979), the Court stated:

> But the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.

Dayton, 443 U.S. at 538. Having found that there are still vestiges of the State's dual school system still lingering in the KCMSD, the obligations of the KCMSD and the State have not been met.

The State argues that under the Constitution of the State of Missouri and the statutes of the State, it was unable to take any affirmative action to dismantle the KCMSD's dual school system. In the general memorandum and order filed June 5, 1984, in discussing the local autonomy of public schools within the State of Missouri, it was stated at page 8: "The State of Missouri does not have the power to require a merger or consolidation of school districts." This statement by the Court was intended to reflect that the state statutes had vested that power in the school districts and had not retained it for the State. It is the conclusion of this Court that none of the provisions of the Constitution nor statutes of the State of Missouri would have prevented the State of Missouri from fulfilling its affirmative duty of disestablishing a dual school system subsequent to 1954. Article 9, § 1(a) of the Missouri Constitution requires the General Assembly to establish and maintain free public schools; Article 9, § 1(b) provides that schools for any contiguous territory may be established by law. Article 3, § 40(20) provides that the General Assembly shall not pass any local or special law "creating new townships or changing the boundaries of townships or school districts." There is nothing in the State Constitution which would prevent the General Assembly from enacting legislation which would give the State sole authority to establish school districts as it sees fit. If such legislation is the only means by which the State can fulfill its 14th amendment obligations, then such legislation is mandatory. It is clear that school districts in the State exist pursuant to the State Constitution and it is also clear that the General Assembly for the State of Missouri may abolish or create districts subject only to the requirement that the territory within the district must be contiguous and subject only to the provision that such may not be done except by general legislation as opposed to special legislation. The General Assembly established the school districts and if it deems necessary, can change them even though to do so might require amendments of some of the present statutes. In this regard the General Assembly has authority which this Court does not have. The teachings of *Milliken v. Bradley*, 418 U.S. 717, as analyzed in *Hills v. Geautreaux*, 425 U.S. 284 (1976) were to the effect that a federal court had no power to restructure the operation of local and state government entities absent a constitutional violation by those entities. Article 1, § 3 of the Missouri Constitution provides that the people of the State have the inherent, sole and exclusive right to alter or reform government whenever they deem it necessary. Article 1, § 4 of the Constitution acknowledges that it is a free and independent state subject only to the Constitution of the United States. Thus it recognizes that its laws must conform to the United States Constitution. As stated in *Milliken I*, "no state law is above the Constitution."

In *Cooper v. Arron*, 358 U.S. 1, 19 (1958), it was stated:

> It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.

In *Board of Education v. Swann*, 402 U.S. 43, 45 (1971), the Court stated:

> [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

Even if the hands of state administrators such as the Commissioner of Education, the State Board of Education, or other agencies were "tied" by state statutes, the State as a collective entity cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system on the basis of restrictive state law. The State executive and its agencies as well as the State's General Assembly had and continue to have the constitutional obligation to affirmatively dismantle any system of de jure segregation, root and branch. This obligation is

parallel with the obligation of the KCMSD. This case is before this Court simply because the KCMSD and the State have defaulted in their obligation to uphold the Constitution.

Having found that there are still vestiges of the dual school system in the KCMSD, the Court finds the issues in favor of plaintiffs against the KCMSD and the State of Missouri and it further finds the issues in favor of the KCMSD against the State of Missouri. Since these defendants have failed to comply with their constitutional obligations, this Court not only has the power but the duty to enter a decree which will correct the continuing effects of past discrimination as well as bar discrimination against blacks in the future. *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

The issues of liability and remedy have previously been bifurcated by this Court. Therefore at this time the Court makes no determination as to what remedy should be decreed nor a determination at this point whether or not the case should be opened for additional discovery and later a trial on the remedy issue. The Court is of the opinion that the initial step which should be taken in regard to remedy would be the preparation and submission of a plan which might obtain the approval of the parties involved as well as the approval of this Court.

Since the State under its Constitution has the duty to establish and maintain free public schools, it has the primary responsibility for insuring that the public education systems in the State comport with the United States Constitution. The State Board of Education and the KCMSD Board of Education have much more expertise than this Court in the operation and management of public schools within this State. The KCMSD Board more clearly

understands the facilities which are available within its system, the extent to which some school facilities are overcrowded while others are not or may even be vacant. it understands the problems of the transportation of students to and from the various school facilities and it more fully understands the administrative problems with which it is faced than this Court does; therefore, the State Board of Education and the KCMSD Board of Education are hereby directed to prepare a plan which would establish a unitary school system within the KCMSD. In doing so, they should concentrate on the schools in which the student enrollment is more than 90% black. They should also, to the extent possible, see that students are permitted to attend a school nearest the student's home so long as by so doing it does not deter from properly integrating the students in the KCMSD. They should also bear in mind cost factors as well as the purpose of the public schools in this state, that is to furnish quality education to its students. While the Court does not intend to limit matters which should be considered to those enumerated above, it does suggest that the above are some considerations which should be kept in mind. It is also the Court's opinion that much of the cost for preparing and implementing a plan to dismantle the vestiges of a dual school system in the KCMSD should be borne by the State. The Court would invite the two Boards to follow the teachings of the United States Supreme Court in regard to appropriate remedies as set forth in *Keyes v. School District No. 1, Denver, Colo., supra; Green v. School Board of New Kent Co., supra;* and *Swann v. Charlotte-Mechlenburg Bd. of Education, supra.* The Court further directs that such a plan be submitted to the Court within ninety (90) days from the date of this order. Plaintiffs will be given thirty days after the plan is filed

in which to file any written objections to it. Upon the submission of such a plan, it may be determined at that time whether or not an additional hearing should be held and evidence received in regard to a remedy.

Accordingly, it is hereby.

ORDERED that the Clerk is directed to enter judgment on the issue of liability in favor of HUD and against plaintiffs; in favor of plaintiffs and against the State defendants and the KCMSD; and in favor of the KCMSD and against the State defendants on its cross-claim; and it is further

ORDERED that within ninety (90) days from the date of this order, the State Board of Education and the KCMSD Board of Education are directed to submit a proposed plan which will have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD; and it is further

ORDERED that plaintiffs shall have thirty (30) days after the proposed plan is filed in which to file objections to it.

/s/ Russell G. Clark
Russell G. Clark, Chief Judge
United States District Court

Dated: September 17, 1984

APPENDIX G

ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, JUNE 5, 1984

(Filed June 5, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,
vs.
STATE OF MISSOURI, et al.,
Defendants.

GENERAL MEMORANDUM AND ORDER

Background

This school desegregation case was filed in 1977 by the Kansas City Missouri School District (KCMSD), its school board and superintendent, and students of the KCMSD. Plaintiffs sought a metropolitan desegregation plan in the greater Kansas City area encompassing two states and seven counties. Named as defendants were the states of Missouri and Kansas, their state boards of education, nineteen school districts and three federal

agencies. Plaintiffs alleged the numerous defendants failed to carry out their affirmative duties to eradicate segregation in the metropolitan area and have actually contributed to segregation by individual and concerted actions.

On October 6, 1978 the Court dismissed the Kansas defendants for lack of jurisdiction and realigned the KCMSD as a defendant. *See*, 460 F.Supp. 421 (W.D. Mo. 1978). Plaintiff school children filed an amended complaint on May 18, 1979 naming as defendants Missouri, its Board of Education, thirteen Missouri school districts including the KCMSD, and three federal agencies seeking metropolitan desegregation and relief from the segregated conditions in the KCMSD. On July 3, 1979 the KCMSD filed a cross-claim against the state of Missouri alleging it failed to carry out its affirmative duty to eradicate the vestiges of its pre-1954 dual school system.

Before the trial to the Court commenced on October 31, 1983, the Raymore-Peculiar School District and the United States Department of Transportation were dismissed by stipulation.

On the 64th day of trial, March 6, 1984, after offering over 2,100 exhibits, calling over 140 witnesses and designating over 10,000 pages of depositions, plaintiffs rested. (*See* Tr. pp. 101-16,372). At the close of plaintiffs' case and before the KCMSD presented evidence on its cross-claim against the state, all defendants except the KCMSD moved for dismissal pursuant to Rule 41(b), Fed.R.Civ.P. This memorandum embodies findings applicable to all suburban school districts, an overview of plaintiffs' theories, and the Court's conclusions of law. Findings of fact notable to each district are in separate sections. References to the defendants in this order, unless other-

wise indicated, refer to the suburban school district defendants.

The Court has reviewed the entire record, and has reached its judgment after consideration of the live testimony, the demeanor, believability and credibility of the witnesses, all of the exhibits, the designated depositions and interrogatory answers filed by plaintiffs. In addition, the Court took judicial notice from time to time of various matters and has considered all such matters in reaching its judgment. The Court has also reviewed plaintiffs' offers made both on the record and in writing and concludes there is no credible evidence that would alter the judgment rendered herein.

Even considering all the exhibits which were not admitted but merely received for the record, the Court still concludes there is no credible or substantial evidence of a constitutional violation by these SSDs.

A study of plaintiffs' witnesses' testimony both at trial and by deposition reveals that none identified any acts of the SSDs done with the intent to discriminate on the basis of race, to contain blacks in the KCMSD, or to keep blacks out of the SSDs. Witness after witness, including witnesses who had been actively involved in the promotion of civil rights, testified that they knew of *no* acts by the SSDs that were done with a discriminatory intent. (*See, e.g.*, Lucille Bluford (Editor of the *Kansas City Call*, Kansas City's leading black newspaper) (Tr. 3125, 3127, 3129); Dr. Edward Fields (longtime black KCMSD administrator) (Tr. 2076-77); James McCreary (longtime KCMSD black administrator) (Tr. 13,743); Joyce Stark (KCMSD School Board President) (Depo. at 111-12, 124-125, 150, 181); and Robert Wheeler (KCMSD black superintendent) (Depo. at 21-22, 24, 29-30, 41, 49).

Procedural Posture

The Court deferred ruling the Rule 41(b) motions of the State of Missouri and HUD. Because of this ruling, Missouri commenced its defense on April 2 and continued until April 18, 1984. When the case resumed on May 7, HUD began its defense.

In regard to HEW,* the motion was deferred on April 2 to give the Court an opportunity to more fully assess plaintiffs' evidence against it. After due consideration, and before any defense by the federal government, the Court on April 18 granted HEW's Rule 41(b) motion. Those findings of fact and conclusions of law will be set forth in a separate order.

For the purposes of the Rule 41(b) motions, "[t]he Court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2371 at 224-25 (1971). The Court has made detailed findings of fact in support of its judgment, *see* Rule 52, Fed.R.Civ.P., and has applied the standards set forth in *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The Court in *Shull* declared, "The district court may find the facts itself and may render judgment against the plaintiff if the Court considers that

---

*The Court realizes HEW was dismantled by Congress in 1979 and was succeeded by Health and Human Services and the Department of Education. *See*, 20 U.S.C. §§ 3401-3510 (1979). However, because HEW, not the Dept. of Education, is the subject of plaintiffs' allegations, the Court will continue to refer to the agency as HEW.

plaintiff has not made out a case, and if the district court sustains the Rule 41(b) motion, its findings will not be reversed on appeal unless clearly erroneous." *Id.* *See also, Lang v. Cone,* 542 F.2d 751, 754 (8th Cir. 1976). Based on these standards, the Court finds that plaintiffs have not proven a case against any of the suburban school district defendants. Because the Court must make specific findings as directed in Rule 52, Fed.R.Civ.P., and to aid in appellate review, *Lora v. Board of Education,* 623 F.2d 248, 251 (2d Cir. 1980), it has made page citations to the 65-volume transcript and 130 depositions.

All defendants except the KCMSD filed Rule 41(b) motions at the close of plaintiffs' case, and the Court's decision regarding the SSDs was entered before any defense was initiated. The Court did proceed, before a recess, with the KCMSD's cross-claim against the State of Missouri, but with the understanding that "once plaintiffs rested, they rested." (*See, e.g.,* Tr. 13,859). Despite the Court's clear pronouncement that none of the evidence adduced during the cross-claim would be considered in ruling the 41(b) motions, plaintiffs repeatedly rose during the presentation of evidence to "join in the offer" for support of its case in chief. Even if the Court were to consider the evidence presented by the KCMSD in its cross-claim, there was nothing in that evidence that would aid plaintiffs' case against the SSDs. That evidence by the KCMSD was not persuasive to the Court insofar as it was arguably relevant to the suburban school districts.

Theories

Plaintiffs' theories involving the SSDs are three-fold: first, that the SSDs, as agents of the state, were guilty

of operating a regional system of segregated schools that centered on and impacted Kansas City with blacks and made the suburbs whiter before 1954; second, that the SSDs failed in their affirmative duty to eliminate the vestiges of the dual school system; and third, that the SSDs are liable for the effects of actions by the KCMSD and other defendants and can therefore be included in an interdistrict remedy. Essentially, plaintiffs seek the realignment or consolidation of the existing KCMSD and surrounding SSDs, which would purportedly produce an integrated educational environment for each child attending school in the KCMSD and surrounding school districts. These theories, when considered in light of the evidence and the prevailing legal standards, must be rejected.

Because this is an interdistrict case, all the evidence comprising this voluminous record must be weighed by that standard. Intradistrict cases are inapplicable. The linchpin of an interdistrict case, as declared by the Supreme Court, is whether there has been a racially discriminatory act by each defendant that substantially caused segregation in another district. *Milliken v. Bradley,* 418 U.S. 717, 745 (1974) (Milliken I).

Boundaries

Plaintiffs seek to racially balance the public school population in the metropolitan area. As *Milliken* explained, however, plaintiffs' only right is to attend school in a unitary school system in the district in which they reside, not to attend school in a racially balanced metropolitan area. 418 U.S. at 746-47. There is a tremendous distinction between looking at racial imbalance as evidence of a segregated school system in an *intra*district case and

equating racial imbalance on an *interdistrict* basis to a constitutional violation: "[T]he use of significant racial imbalance in schools *within* an autonomous school district as a signal [in intradistrict cases] which operates to shift the burden of proof is a very different matter from equating racial imbalance [between two school systems in an interdistrict case] with a constitutional violation calling for a remedy." *Milliken*, 418 U.S. at 741 n.19 (emphasis added). *See also, Lee v. Lee County Board of Education*, 639 F.2d 1243, 1254-55 (5th Cir. 1981). This being an interdistrict case necessarily requires rejection of intradistrict presumptions.

In order for plaintiffs to prevail, they had to prove that the school district boundaries as originally established or later maintained, evidenced a racially discriminatory motivation; inferences from discriminatory impact would not suffice. *Washington v. Davis*, 426 U.S. 229 (1976). Lack of proof of discriminatory intent in the establishment or changing of any school district boundary lines requires the Court to reject plaintiffs' arguments and effectively distinguishes the interdistrict cases granting relief upon which plaintiffs rely. *Cf. Morrilton School District No. 32 v. United States*, 606 F.2d 222, 225-27 (8th Cir. 1979) *cert. denied*, 444 U.S. 1071 (1980); *United States v. Missouri*, 515 F.2d 1365 (8th Cir), *cert. denied*, 423 U.S. 951 (1975) (the *Kinloch* litigation); and *Haney v. County Board of Education*, 410 F.2d 920 (8th Cir. 1969) (pre-Milliken). All of these Eighth Circuit cases evidenced racial gerrymandering, an action specifically recognized in *Milliken* as justification for an interdistrict remedy. 418 U.S. at 745. It is axiomatic, however, that absent a constitutional violation in one district producing a significant segregative effect in another district, the boundaries of separate and

autonomous school districts must be respected. *Id.* at 745-46.

The hub, therefore, of plaintiffs' argument is that the SSDs are not separate and autonomous but are instead agents of the state whose boundaries are constantly disregarded and can therefore be ignored in fashioning an appropriate remedy. Guided once again by *Milliken*, plaintiffs' position is rejected:

> Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. (citations omitted).

418 U.S. at 741-42. Applying the local control measure to Detroit, the Supreme Court concluded there were no constitutional violations by those districts that would justify "consolidation of 54 independent school districts historically administered as separate units into a vast new super school district." 418 U.S. at 743. A review of school district existence in Missouri leads the Court to conclude the SSDs are more autonomous than those discussed in *Milliken* and numerous other desegregation cases.

Local Autonomy

Establishment of school district boundaries in Missouri is controlled at the local level to a greater degree

than in Michigan. *Compare* Mo. Rev. Stat. §§ 162.222, 162.441 (1978), § 162.431 (Supp. 1983) (requiring approval of the qualified voters in each school district affected) *with Bradley v. Milliken*, 484 F.2d 215, 247-48 (6th Cir. 1973) (Michigan school districts are not highly locally autonomous because of various Michigan statutes giving the Michigan State Board of Education the power to change boundary lines and to merge school districts), *rev'd*, 418 U.S. 717 (1974). The state of Missouri does not have the power to require a merger or consolidation of school districts. Based upon a review of Missouri statutes and those cited by the Supreme Court in *Milliken*, 418 U.S. at 742, and those relied on by the Sixth Circuit in *Bradley v. Milliken*, 484 F.2d 215, the Court finds that Missouri school districts have *more* authority and autonomy than Michigan school districts. The independence of the local districts in Michigan was sufficient for the Supreme Court to conclude interdistrict relief was improper.

The Court finds that school districts in Missouri are governed by locally elected boards of education and have the authority and autonomy to control boundaries, curriculum, finance and administrative matters. Based on these facts, and on a review of the facts relied upon in *Lee v. Lee County Board of Education*, 639 F.2d 1243, 1256 (5th Cir. 1981), the Court finds that the school districts in Missouri have at least as much independence and autonomy as school districts in Alabama where interdistrict relief was denied.

Public education in Missouri is structured differently than public education in Indiana. In Indiana, the state has far more authority and control over school district boundaries. For instance, in *United States v. Board of School Commissioners*, 637 F.2d 1101, 1124-25 (7th Cir.),

cert. denied, 449 U.S. 838 (1980), the court found that legislation affecting the boundary lines of the Indianapolis Public Schools had been enacted with a racially discriminatory purpose. There is no such evidence here.

Public education in Missouri is also structured differently than public education in Delaware. There, the state has substantially more authority and control over local school district internal matters and school district boundaries. *See, e.g., Evans v. Buchanan*, 393 F.Supp. 428, 438 (D. Del.), *aff'd mem.* 423 U.S. 963 (1975). In *Evans*, the court determined that the enactment of the Education Advancement Act violated the Equal Protection Clause of the 14th Amendment.

Likewise, public education in Missouri is structured differently than public education in Kentucky. There, the court referred to school district lines as being "artificially drawn." *Newburg Area Council v. Board of Education*, 510 F.2d 1358, 1360 (6th Cir. 1974) *cert. denied*, 421 U.S. 931 (1975). A Kentucky statute authorized reconsolidation of school districts within a single county even without consent of the county school board. Also, the court found evidence that the school district boundaries had been ignored in the past for the purpose of aiding and implementing continued segregation.

There was no credible evidence that any of the boundaries of any defendant school district were established or maintained with any racially discriminatory intent. The only evidence regarding boundaries concerned the KCMSD and Independence, over the Van Horn attendance area, and is discussed *infra*. The boundaries have been properly established and maintained by each SSD, and each district manages its own school affairs within

its own boundaries. Establishment of school district boundaries is a local matter in Missouri, and the Court finds that each of the boundaries of the school districts involved in this case were established through local initiatives, with no taint of any racial animus. This fact alone distinguishes the instant case from many upon which plaintiffs rely including *Newburg, Evans, Hoots v. Pennsylvania*, 672 F.2d 1107 (3d Cir.), *cert. denied*, 103 S.Ct. 55 (1982) and *Morrilton School District No. 32 v. United States*, 606 F.2d 222 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980).

Reviewing plaintiffs' evidence, the Court is not persuaded by the testimony of Raphael Nystrand to the effect that Missouri school districts do not have local control of education. Mr. Nystrand based his opinion on standards set by the federal government and private accrediting agencies, entities over which the state of Missouri has no control. (Tr. 6177-78). Actions by these entities have no effect on the autonomy of Missouri school districts. Moreover, Mr. Nystrand agreed that no single tradition in public education was more deeply rooted than local control. (Tr. 6178). Indeed, he agreed that the principles of local control are a significant theme in school politics across the nation. (Tr. 6195-96).

The Court finds that local school districts in Missouri have the following characteristics, powers and authority:

1. School districts are governed by local boards of education that are elected by the voters residing in the district. (Tr. 6179).

2. School districts, not the state, hire superintendents and teachers. (Tr. 6179-80)

3. School districts, by a vote of the residents, establish their own tax levy. (Tr. 6180; P. Ex. 1737).

4. Reorganization is a decision made by the local school district; a reorganization plan could be submitted to the voters of a school district even though the Missouri State Board of Education did not approve the plan and the voters could adopt or reject the reorganization. (Tr. 6184).

5. The Constitution of Missouri, Art. 3, § 20, prohibits the General Assembly from enacting "any special law changing the boundaries . . . of any school districts." (Tr. 6181).

6. Local school districts have the plenary power to establish school attendance zones. (e.g. P. Ex. 2267).

7. Local school districts determine whether to provide transportation for their students. (Lowell Depo. at 6).

The Court also finds that the Office for Civil Rights, the federal agency in charge of monitoring civil rights compliance of local school districts, has always recognized the local autonomy of Missouri school districts and treated the school districts accordingly. (High Depo. Vol. I at 65, 70, 110-111; Ward Depo. Vol. I at 30).

Another strong indication supporting the Court's conclusion that the local school boards are autonomous entities is the fact that the school boards are not afforded Eleventh Amendment immunity as an agent of the state but must be sued instead in their own names. *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Miener v. Missouri*, 673 F.2d 969 (8th Cir.) *cert. denied*, 103 S.Ct. 215 (1982).

The autonomy of the local districts is evidenced in the pre-1954 period by each local school district deciding whether to educate their black students, if any, at schools within the district or to transfer them to schools in another district. (Tr. 372, 378, 622, 624, 696-97, 871-72, 1084-86, 1124, 1126, 1136-1138, 1154, 1199, 5837 and P. Ex. 1814). Local school districts also made the decision whether to educate white students at schools within their district, to operate a high school in the district, or to transfer their high school students to high schools in another district. (Tr. 335-36). A school district, in its discretion, could refuse to accept transfer students, both black and white and usually considered tuition costs and space in making such decisions. (P. Ex. 1768, P. Ex. 1769). Each school district receiving transfer students established their own rules or regulations to apply to those students' education. (P. Ex. 1774).

Having reviewed hundreds of minutes from various boards of education in this case, the Court is fully convinced, and hereby finds, that each of the school districts is a locally autonomous and independent entity. Because each defendant district is independent and autonomous from the state of Missouri, and from all other school districts, none has an affirmative duty to merge with other districts. None can be held vicariously liable for the acts of the state, federal government or other entities. And, absent a finding of an interdistrict constitutional violation, none can be made a part of an interdistrict remedy.

In regard to the first theory, plaintiffs point to interdistrict student tranfers made by some of the SSDs pursuant to state mandate before *Brown v. Board of Education*, 349 U.S. 483 (1954) (*Brown I*). The fact that such transfers were made before the Supreme Court declared

separate schools unconstitutional does not entitle plaintiffs to relief. Instead, plaintiffs had to prove first that the segregated schools existing before 1954 were the direct and substantial cause of blacks leaving *each* defendant district; second, assuming that occurred, that it had a significant segregative effect in the KCMSD. *See*, 418 U.S. at 744-45; *Lee*, 639 F.2d at 1256 ("there must be clear proof of cause and effect and a careful delineation of the extent of the effect"). Plaintiffs' proof was weak, speculative and in any event *de minimis*.

The "vestiges" theory also fails. First, the affirmative duty to eliminate vestiges is premised upon the notion that each defendant district produced the segregation sought to be eliminated and therefore has a duty to undo its damage. Second, the affirmative duty plaintiffs would impose (assuming one exists) is far more expansive than that required by the Constitution. The Court in *Milliken* articulated the parameters of a school district's obligation when it declared, "the constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system *in that district*." 418 U.S. at 746. (emphasis added). Thus, the KCMSD and each SSD has an obligation to provide a unitary school system in *their* respective districts. Failure to dissolve, merge, legislate, cooperate or entice blacks into their districts does not, as plaintiffs suggest, evidence a constitutional violation for which this Court can mandate an interdistrict remedy. Such actions may be urged by social scientists but that does not create a constitutional duty. While minds, like parachutes, work best when open, the Court cannot judicially create openmindedness nor impose an obligation absent a constitutional violation.

In regard to the "effect" theory, plaintiffs suggest in their amended complaint that, "as agents and subdivisions

of the state, the defendant school district . . . must be included in an interdistrict remedy, even absent any finding that they have committed specific violations on their own initiative." Such a "no-fault" position was argued by Justice Marshall dissenting in *Milliken*:

> Nor should it be of any significance that the suburban school districts were not shown to have themselves taken any direct action to promote segregation of the races. Given the state's broad powers over local school districts, it was well within the State's powers to require those districts surrounding the Detroit school district to participate in a metropolitan remedy.

418 U.S. at 807. The majority considered and rejected this position demanding instead there be a violation, or *cause*, by each defendant district as well as an interdistrict *effect*:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, *it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district*. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by

> the constitutional violation. *Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.*

418 U.S. at 744-45. (emphasis added).

While it may be within the province of another Court to review and rewrite the standard, it is this Court's obligation and duty to apply the law, as presently composed, to the facts of this case. That application compels the Court to reject plaintiffs' theories and grant the suburban school district defendants' motions for judgment pursuant to Rule 41(b).

I. Pre-1954 Evidence

The defendants admitted, and the Court judicially noticed, that Missouri mandated segregated schools for black and white children before 1954. *See*, MO. CONST. Art. IX, § 1(a) (1945) (rescinded 1976) *and* §§ 163.130, 165.117 R.S.MO. (repealed 1957). These provisions were not immediately and formally abrogated after the *Brown* decision was announced; however, the State's Attorney General issued an Opinion in 1954 declaring them unenforceable. (P. Ex. 2232). The statutes were repealed in 1957 and the constitutional provision was finally rescinded in 1976. This historical background is recounted in more detail by the courts in *Adams v. United States*, 620 F.2d 1277, 1280-81 (8th Cir.) *cert. denied*, 449 U.S. 826 (1980); and *United States v. Missouri*, 363 F.Supp. 739, 746-47 (E.D. Mo. 1973) *aff'd* 515 F.2d 1365 (8th Cir.) *cert. denied*, 423 U.S. 951 (1975).

Plaintiffs argued that in response to this mandate, Missouri through its agents, the SSDs, maintained a regional black interdistrict school system causing blacks

to leave the SSDs and migrate to Kansas City in search of an education. Plaintiffs' argument is not supported by the law or the evidence. While the law required separate schools to be provided, it did not require separate school *districts*. *Compare, Bradley v. School Board*, 462 F.2d 1058, 1065 (4th Cir. 1972) *aff'd* 412 U.S. 92 (1973). The manner in which blacks in any defendant district were educated was solely a matter of local control and within the discretion of the local school district. (Tr. 5837; P. Ex. 1814). As discussed *supra*, each defendant district was, and is, an autonomous entity not, as plaintiffs suggest, an agent of the state.

The major support for plaintiffs' case came from various lay witnesses and the opinions of an expert historian, Dr. Anderson. According to Dr. Anderson, segregated schools were legally mandated for most or all of the years from 1889 to 1954. (Tr. 4223-24). This fact, so plaintiffs' theory goes, would compel blacks in the three-county area surrounding Kansas City to migrate to schools in Kansas City in significant numbers. From 1910 to 1920, a time when Dr. Anderson testified the depopulation had begun in earnest, the number of blacks enumerated in the three-county area decreased by 287 people yet the number of blacks enumerated in the KCMSD increased by 6,676 people. From 1930 to 1960, the black population in the three-county area (excluding the KCMSD) decreased by approximately 550 people. During that same time period, the black population in the KCMSD increased by approximately 45,000 people. (Tr. 4573-74). Even assuming the entire decrease in the three-county area can be accounted for only by people leaving and going to Kansas City because of the dual school system, the Court finds the impact of that move-

ment on the KCMSD enumeration insignificant. (P. Ex. 53E[sub]).

The Court is not persuaded by Dr. Anderson's opinion that the greatest number of the blacks coming into Kansas City from 1865 to 1954 did not come from the deep south but came instead from inside Missouri. (Tr. 4458-59).

The Court finds that contrary to Dr. Anderson's opinion, blacks in the three-county area outside of Kansas City and the towns of Liberty, Independence and Excelsior Springs were mostly rural, farm-dependent families. (Tr. 331, 454, 526, 796, 901-906, 935, 952, 1008, 1052, 1089, 1100-1103, 1105, 3139, and 3165-66).

A school district's enumeration counts the number of people between the ages of six and twenty residing in the district. (Campbell Depo. at 165). In 1881 blacks comprised 13.6% of the KCMSD enumeration while in 1954 blacks comprised 14.0% of the KCMSD enumeration, (P. Ex. 53E[sub]), an increase over the entire period of only .4%. (Tr. 4215).

Plaintiffs' evidence of transfers from suburban school districts to the KCMSD from 1900 to 1954 resulted in a total of only 251 students. (Tr. 4557-59). The Court finds that as of 1954, less than .5% of the total number of black students enrolled in the KCMSD black schools were from other districts and included students from non-party defendant districts. (Tr. 2043). The number of black students that attended Lincoln High School prior to 1954 from school districts other than the KCMSD was insignificant when compared to the total number of black students that attended Lincoln. (Tr. 1773). In 1954-55, the black enrollment in the entire KCMSD was only

18.8%. (Def. Ex. K2). And for every year prior to 1970, the enrollment in the KCMSD remained majority white. (Tr. 3352, D. Ex. K2).

Plaintiffs attempted to bolster their depopulation theory by introducing a list of 44 names compiled by Marvin Robinson purporting to show individuals that were transferred to Lincoln High School before 1954 and subsequent to their transfer lived in Kansas City. The Court finds the list does not show a connection between black schools in Kansas City and the movement of blacks into Kansas City. As made apparent on cross-examination, a number of the people on the list now live in Independence or other places throughout the United States; some people on the list lived in Kansas City for only a short period of time; some did not even move to Kansas City until after 1954. Nor was there credible evidence as to why these 44 people moved to Kansas City. (Tr. 2163-64, 2168, 2170-81). The total is insignificant in any event.

The most significant pre-1954 increases in the KCMSD black enumeration took place during the World War I (from 1910 to 1920 an increase of 6,676) and World War II periods (from 1940 to 1950 an increase of 3,223). Dr. Anderson admitted that the world wars were factors that brought blacks into the KCMSD, and the Court finds that the substantial increases in the KCMSD black population are in large part due to the unusual economic and employment ramifications of the world wars and intervening depression. (Tr. 5932-34, 9988-90).

The most rapid and substantial increases in black students in the KCMSD occurred after 1954 and through the 1960's. (Tr. 1797-98, P. Ex. 2638). Dr. Anderson,

who admitted that he could not accurately quantify the effect the prior segregated schools had on black people moving (Tr. 4332-34), testified that jobs and economics were certainly factors causing blacks to move to Kansas City. (Tr. 4486, 4605). Plaintiffs' black lay witnesses also confirmed the importance of job location and economic opportunity in their decisions to move. (Tr. 595, 600, 676-78, 713, 796, 911, 1052, 1089, 1103, 1111, 1163, 1307, 1312, 1318, 1552, 1579-80, 1680-81, 1728, 2781, 3214, and 3267). The Court finds that jobs and economic opportunity were primary motivators for blacks leaving the three-county area and moving to Kansas City and elsewhere, and that any motivation resulting from segregated schools was *de minimis* and insignificant when compared to those primary motivating factors. The Court further finds that transferring blacks to the KCMSD under the prior segregated school system is not a cause of the present racial distribution of the population in the three-county area. Many of plaintiffs' lay witnesses demonstrated that they did not move to where they were transferred to school. (Tr. 372, 565, 632-36, 676-80, 714, 719, 841, 1216-17, 1334-35, 1358-60, 1385-86, 1664-65, 2587-88, 2699-2704, 3170-73).

The Court also observes that the absence of black schools in any of the defendant districts did not discourage black families from outside (or from within) Missouri from moving to and living in those districts. (Tr. 1153-54, 1213-14, and 1252-54).

Furthermore, plaintiffs have not persuaded the Court that any vestiges or significant effects of the pre-1954 dual school system remain in any of the SSDs. Similarly, the Court is not convinced that any one of the school district defendants was involved in any interdistrict violation

that had a substantial segregative effect in the KCMSD as required by *Milliken*. On the contrary, the Court finds that each of the defendant suburban school districts disestablished its pre-1954 school system with deliberate speed and that all vestiges of that system have long since ceased to exist. Unlike *Bradley*, 338 F.Supp. at 167-176, there was not massive resistance to the *Brown* decision. Still, in that case, interdistrict relief was denied. 462 F.2d 1058, *aff'd* 412 U.S. 92. Specific findings regarding each district's desegregation efforts and unitary status are contained in individual sections *infra*.

II. Duty To Eliminate "Vestiges"

School District Association

It is plaintiffs' argument that the SSDs had a constitutional obligation to racially balance the metropolitan area—had an interdistrict vehicle, the Cooperating School Districts Association of Suburban Kansas City available—and failed to seize the opportunity. Plaintiffs also implied there was some racial motivation in the Association's actions. There is absolutely no evidence to justify plaintiffs' allegations.

The Association was formed in 1971 (Tr. 4819) with its primary purposes being to impact on state funding legislation and to save money through cooperative purchasing. (Tr. 4823). There is no evidence, however, that any school district member relinquished local control, joined with racial animus or promoted any program having a racial effect. The KCMSD was eligible to join. (Tr. 4824).

Cooperative efforts among school districts does not negate their autonomy. *Taylor v. Ouachita Parish School Board*, 648 F.2d 959, 965 (5th Cir. 1981); and *Lee*, 639

F.2d at 1256-57. And, as discussed *supra*, there is no duty on the part of any SSD to cooperate in the racial balancing of the metropolitan area.

The Sales Tax

Plaintiffs have pointed to the cooperation by the school districts with the City of Kansas City in regard to sales tax proceeds as evidence of interdistrict cooperation on subjects other than desegregation. How this sharing of revenues adds to plaintiffs' case is beyond the Court. There is no affirmative duty to refrain from racially neutral cooperative efforts—particularly one that inures to the benefit of the KCMSD's students. Plaintiffs intimated, but did not prove, that some of the SSDs were racially motivated in their concerns regarding the "strings" attached to the revenue. The Court finds otherwise.

The voters of Kansas City approved a 1/2% sales tax on August 16, 1974 with the revenues generated to be distributed proportionately to all school districts partially or wholly within the City of Kansas City. (P. Ex. 1763, 1767). That included the KCMSD and all SSDs with the exception of Blue Springs and Fort Osage. (P. Ex. 1767 and 1999). It also included three districts that are not party defendants. (P. Ex. 1767). The sales tax was used to generate money because the KCMSD had not been able to pass a bond issue or tax levy since 1965. (P. Ex. 1763).

Each recipient school district entered into a Cooperative Agreement with the City of Kansas City. (*See, e.g.*, P. Ex. 1746). The City Council Resolution not to interfere with the administration of any school district in the distribution of funds (P. Ex. 1763, 1767), was not the result of racially motivated concerns by the primarily white

SSDs; instead, the resolution was in response to a constitutional challenge of the sales tax. (The Missouri Constitution, Article III § 40(24) prohibits passage of special laws regulating the management of public schools. The Missouri Supreme Court has held this provision to apply to municipal legislation, *Mathison v. Public Water Supply District No. 2*, 401 S.W.2d 424 (Mo. 1966), thereby requiring the "no strings attached" disclaimer.)

In each of the years the revenues were distributed, the KCMSD received at least 59% of the total. That amounted to $12,612,339.00 while Hickman Mills, recipient of the second largest share, received only $2,645,521.00. (P. Ex. 1746, 1767, 1999).

The Court finds there was no discriminatory intent nor result by any defendant district. The sharing of sales tax revenues by school districts is simply not a constitutional violation. *Taylor v. Ouachita Parish School Board*, 648 F.2d 959 (5th Cir. 1981).

Juvenile Homes

Plaintiffs' evidence adduced the fact that there are juvenile court homes located in several of the SSDs which homes were once operated by the KCMSD. Plaintiffs also allege the children remained segregated by race until the early 1960's.

Even if the Court accepts plaintiffs' position as true, there is still no interdistrict violation rising to the level required by *Milliken* to impose the remedy sought. It is the Jackson County Court, not the SSDs, that selected the sites for the schools. It is the Juvenile Court that commits children to the schools, not the KCMSD or any other district; and there is absolutely no showing that the schools have had a racial impact on the KCMSD or any SSD.

While the Court may agree that the county courts are state entities, that fact does not tend to establish a constitutional violation by any SSD.

Special Education

As further evidence of the fact that the SSDs are not autonomous, plaintiffs point to the interdistrict arrangements made for special education. Again, plaintiffs' position is that the school districts can and do cooperate in the provision of educational services but refuse to cooperate to desegregate the metropolitan area. Once again the Court concludes that interdistrict operation of specialized programs does not compromise the SSDs' autonomy nor evidence racial discrimination. While the districts had the legal capacity to allow or participate in interdistrict transfers, they had no legal obligation to do so.

As discussed in the sections regarding individual districts *infra*, the school districts contract among themselves to provide for the education of the handicapped and especially needy children living in their respective districts. Those contractual arrangements are done pursuant to state law which imposes a specific duty on the districts to provide a gratuitous education to all handicapped and severely handicapped children residing in their district. *See*, § 162.670 *et seq.*, R.S. Mo. The federal government promotes "free appropriate public education" for handicapped children by providing states with financial assistance. 20 U.S.C. § 1411 *et seq.* Because of the proportionately small number of handicapped children residing in each district, they must cooperate in the exchange of students and services to meet their statutory obligations in an administratively efficient manner. The ar-

rangements made, however, are not racially discriminatory nor do they abrogate the districts' autonomy.

The fact that interdistrict cooperation of this nature is possible may have relevance at a remedy stage, but it does not assist plaintiffs in proving interdistrict constitutional violations.

Vocational Education

Plaintiffs also alleged the establishment and operation of area vocational technical schools in the Kansas City area was purposefully designed to perpetuate racial segregation. Plaintiffs also point to the interdistrict cooperative nature of the vocational schools. A review of the evidence, however, leads the Court to conclude that the vocational educational system in the Kansas City area is not an interdistrict constitutional violation.

Beginning in 1965, the state of Missouri began distributing federal funds to local school districts desiring to provide vocational technical training for their students through the federal Area Vocational Technical School (AVTS) program. (P. Ex. 1552). Each district, in its discretion, determined whether or not to participate in the program and in what manner their participation would occur. (Drake Depo. at 130-131). Those individual decisions did not dilute the districts' autonomy.

In 1965, the KCMSD was the first district in the area to request it be designated as a "host" district to operate an AVTS facility. (Tr. 6359, Drake Depo. at 20). The KCMSD did not invite nor seek to associate with any other district in its AVTS; instead, it sought explicitly to serve only those students attending school in its district. At that time, it was a majority white school

district with a student population of 50,000 including ten high schools which would operate as "sending" schools to the proposed AVTS. (Tr. 6221, 6360-62; D. Ex. K2). The fact that other districts do not participate in KCMSD's AVTS is not a vestige of any prior dual school system.

The Fort Osage AVTS opened in 1968. Fort Osage, Blue Springs, Grain Valley and Oak Grove participate in the Fort Osage AVTS; the latter two districts are not parties to this litigation. (P. Ex. 1709, 1733, Gragg Depo. Vol. I at 90-91, Drake Depo. at 93). The KCMSD did not request that Fort Osage participate in its AVTS or even suggest such a possibility was available. (Bartow Depo. at 100, Gragg Depo. Vol. II at 93-94, 96). Fort Osage did not investigate participation with the KCMSD due to the long distance between the KCMSD and Fort Osage. (Bartow Depo. at 98, 108). The Court finds the establishment of the Fort Osage AVTS was not motivated by a desire to discriminate against minorities but was based instead on sound educational and organizational reasons. It is far removed from the KCMSD and would have been impractical for Fort Osage and Blue Springs to participate in the KCMSD AVTS.

In 1971, Raytown was approved for designation as an AVTS. (P. Ex. 1537). Six school districts, Center, Grandview, Hickman Mills, Independence, Lee's Summit and Raytown, with a total of eight high schools enrolled students at the Raytown AVTS. (P. Ex. 453). There is no evidence that KCMSD participated in the discussions about Raytown's AVTS formulation (probably because KCMSD had already sought and obtained designation as an area to maintain an AVTS). The Court finds the fact that KCMSD did not participate in these discussions

was not related to race or an intent to discriminate. (Tr. 2057).

KCMSD's former acting superintendent, Dr. Fields, testified that he was involved in vocational education and he knew of no AVTS designation that was deliberately sought, designated or maintained to perpetuate segregation. (Tr. 2057). In fact, he testified that the various AVTS's were established to foster administrative convenience and to prevent overlap. (Tr. 2057).

North Kansas City School District does not participate in any additional educational technical program with another district or in an AVTS. (Doolin Depo. Vol. I at 47-48, Waier Depo. at 127-29). Park Hill participates in the Platte City AVTS and Platte City School District is not a party to this litigation. (P. Ex. 34). Liberty participates in the Excelsior Springs AVTS which is another school district not a party to this case. (P. Ex. 34).

Dr. Nystrand gave testimony that there were no sound administrative reasons for the current configuration of the AVTS's in the metropolitan area. He admitted, however, that some great distances existed between the KCMSD's AVTS and major towns in other districts that participate in outlying AVTS centers. (Tr. 6215). And, there are school districts geographically further removed from KCMSD currently not parties to the suit who participate with some defendants in an AVTS facility. (P. Ex. 1709, Gragg Depo. Vol. II at 43).

The only testimony which contended that the AVTS's were operated in a discriminatory manner came from Dr. Charles Benson. Dr. Benson, who the plaintiffs tendered as an expert in the financing of vocational education, did

not claim to know of any racial discrimination but he alleged financial discrimination. Although Dr. Benson found fault with the way the state of Missouri vocational education funding formula impacted on the KCMSD, he admitted it had been approved by the federal government. (Tr. 6359). The Court notes in fact that Dr. Benson found fault with all 50 states' funding formulas for vocational education. (Tr. 6384). There is no evidence demonstrating that any defendant district was trying to contain any racial group within KCMSD by virtue of the use of funds obtained through the formula. Furthermore, the $115.38 per student that the KCMSD received from the federal government in fiscal year 1982 was far more than any suburban defendant AVTS received. (Tr. 6373).

The Court finds that plaintiffs have not demonstrated a constitutional infirmity in the state's formula for distributing vocational educational monies under the standards of *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). There has been no evidence that vocational educational monies have been distributed with a purposefully discriminatory motive or effect.

Vocational education in the Kansas City metropolitan area is unitary and is not a vestige of any prior dual school system. The area schools were established without discriminatory intent and there was no credible evidence that their operation had the effect of segregating students on the basis of race. Unlike St. Louis, there is no separate "Special District" for vocational education drawn along racially segregative lines. See *Liddell v. Board of Education*, 491 F.Supp. 351, 353 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643, 651 (8th Cir.) (Liddell III), *cert. denied*, 454 U.S. 1081, 1091 (1981). The Court finds that the operation of vocational education in the Kansas City metropolitan

area is not an interdistrict constitutional violation. Nor do the districts' cooperative abilities in this regard support a finding of liability.

Merging Opportunities

Even if there were a duty on the SSDs to promote racial balance in the metropolitan area, plaintiffs' evidence fails to demonstrate an intent on the part of the SSDs to racially discriminate in their various positions nor is there evidence, in many instances, that the measures raised had or would have had an integrative effect.

House Bill 171

House Bill 171 (P. Ex. 977) is an example of such a measure. It was passed by the Missouri General Assembly and signed by the Governor in 1957. 1957 Mo. Laws 454. Prior to the enactment of H.B. 171, § 165.563 provided in part:

> Every city in this state now having or which may hereafter have *500,000* inhabitants or over, together with the territory now within its limits, or which may in the future be included by any change thereof, shall be and constitute a single school district. . . .

Mo. Rev. Stat. § 165.563 (1949) (emphasis added). H.B. 171 amended this section so that it would apply to Missouri cities having *700,000* or more inhabitants.

The legislative history demonstrates that H.B. 171 did not amend the population level prescribed by § 165.563 for the first time; the section's predecessor was enacted in 1897. Act of March 23, 1897, § 2, 1897 Mo. Laws 221 (1897). It provided that a city exceeding 300,000 persons shall constitute a single school district. That

statute was then amended in 1909 to change the population level from 300,000 to 500,000 persons. Act of May 28, 1909, § 1, 1909 Mo.Laws 846 (1909). There is no evidence nor did plaintiffs argue that the Missouri General Assembly chose to establish the population level at 300,000 in 1897 for racial reasons or to amend it to 500,000 in 1909 for racial reasons.

There are additional reasons supporting the Court's finding that House Bill 171 was not discriminatorily enacted: First, Representative J. McKinley Neal, a black representative from a legislative district within the KCMSD (Tr. 4653), voted for H.B. 171. Representative Neal had long been active in promoting civil rights organizations such as the NAACP and the Urban League (Tr. 4653), and he introduced the legislation which led to the creation of the Missouri Commission for Human Rights in 1957. (Tr. 3130). Second, not one state representative or senator, black or white, cast a vote against H.B. 171. (SSD Ex. 4). Third, the Court finds that the state of Missouri enacted H.B. 171 for the same reasons that it had prescribed a population level in 1897 and amended that figure in 1909. Its purpose was to avoid administrative confusion and problems resulting from annexations or population changes. Fourth, the KCMSD designed the amendments prescribed by H.B. 171 and supported the passage of the bill. (Tr. 4648, 6222). The Court finds that the KCMSD supported H.B. 171 because of bonding and operational problems that would result if the KCMSD automatically expanded and became coterminous with the City of Kansas City. (Travis Depo. at 93-100). Furthermore, the black enrollment in the KCMSD was stable during this period; in 1956, the student population was 22.3% black and in 1957 it was 22.8% black. (Tr. 2048). Finally, Representative Frank Mazzucca, whose

district included part of the KCMSD (Tr. 4651-52), introduced H.B. 171 in the Missouri General Assembly. (SSD Ex. 4). His actions were not motivated by racial concerns.

The population of the City of Kansas City did not exceed 500,000 in the 1960 census. (Tr. 13,315-16). Therefore, H.B. 171, changing the population trigger to 700,000, did not affect the boundaries or racial composition of any defendant school district including the KCMSD. Furthermore, the Court notes that significant annexations in eastern and southern Jackson County and Clay County to the City of Kansas City occurred after H.B. 171 was enacted. (P. Ex. 425). There has been no showing by plaintiffs that the KCMSD's present racial composition would have been different had H.B. 171 not been passed.

The KCMSD annexed several all-white school districts following 1954, including Sugar Creek in 1955, Rock Creek in 1957, Pitcher-Fairview in 1958, and Pleasant Valley in 1973. (Tr. 1974, 6120; P. Ex. 407). The Court finds that based on this evidence that even after the *Brown v. Board of Education*, 347 U.S. 483 (1954), decision, and after the enactment of H.B. 171, the KCMSD was annexing school districts and gaining white students through those annexations. The Court must therefore conclude that H.B. 171 was not enacted with the intent to concentrate black students within the KCMSD nor did it constitute an intentional interdistrict violation.

Spainhower and Related Proposals

Plaintiffs also point to the Spainhower Commission's report and other metropolitan proposals as evidence of racial animus and a derogation of the SSDs' duty to eliminate the vestiges (by promotion) of a dual school system.

The Spainhower School District Reorganization Commission report of 1979 contained multifaceted recommendations involving, for example, finance, boundaries, and various levels of local control. The Court finds that the General Assembly did not enact the recommendations of the Spainhower Commission because it desired to maintain Missouri's strong tradition of local control over public education. (Tr. 6095, 6967; Spainhower Depo. at 35-36, P. Ex. 497, 1728, 2172 and 2192). The statewide nature of the Commission's recommendations would have substantially reduced local control.

There was no credible evidence on which the plaintiffs may rely to attempt to support their allegation that racial concerns led to the defeat of the Spainhower recommendations. Dr. Nystrand testified that the defeat of the Spainhower recommendations resulted from a desire to maintain local control and from racial concerns. (Tr. 6095). While there has been considerable evidence to support the Doctor's conclusion regarding local control, the plaintiffs did not present facts to support the conclusion that racial opposition caused the recommendation's defeat. Allegations that some legislators may have made private comments about race, (Spainhower Depo. at 30), even if accepted as true, were not a significant factor contributing to the recommendation's demise. (Spainhower Depo. at 30-37). Nor is plaintiffs' position bolstered by evidence that private individuals opposed the Spainhower recommendations. The vast majority of opposition by private individuals was motivated by concerns that the patrons' sense of participation would be negated and that local control would be diminished. These concerns were altogether unrelated to race. (Tr. 6967, P. Ex. 497). Moreover, private racially-motivated

opposition is factually irrelevant. No defendant or governmental entity adopted these purported racial motivations or was prompted to act or to refrain from acting because of them. Nor does private opposition constitute "state action" under the Fourteenth Amendment; therefore such opposition is also legally irrelevant. *See, United Brotherhood of Carpenters, Local 10 v. Scott,* 103 S.Ct. 3352, 3357 (1983).

The plaintiffs have offered evidence that various school district defendants expressed opposition to the Spainhower recommendations. The evidence shows that the defendant districts which opposed the recommendations opposed them because they desired to maintain the control and authority over educational matters exerted by the local boards of education. (P. Ex. 1728). Also, the districts had great pride and a sense of community in the school districts which they had built. The recommendations proposed to destroy or to alter those districts in a fundamental fashion. (Spainhower Depo. at 35). There were simply myriad reasons for opposition to these recommendations that had no discriminatory basis.

Additionally, the variety of proposals to restructure school districts in the metropolitan area drew both support and opposition. Some of those proposals, such as Dr. Hazlett's article in "Conceptions for Changing Times," suggested a metropolitan school district which did not include all of these defendant districts.

The "Milwaukee Plan" which essentially pays incentives for black students to attend school in other districts also failed in the state legislature. The Missouri Department of Education concluded that the bill as introduced was too expensive for the state.

There is no evidence that any of the SSDs rejected or declined to consider these proposals for reasons at all related to race. Plaintiffs failed to adduce any evidence of racial intent by any of these suburban school district defendants. *Cf. Bradley v. School Board,* 338 F. Supp. at 158 (opposition to merger suggestions) *rev'd,* 462 F.2d 1058 (4th Cir. 1972) *aff'd mem.,* 412 U.S. 92 (1973). And absent a duty to merge, arguing failure to do so is legally irrelevant.

Employment Practices

In an intradistrict setting, courts often consider faculty composition as one indicator of a segregated school system. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Plaintiffs argue in this interdistrict context, however, that faculty imbalance between the SSDs and the KCMSD is a vestige of the prior dual school system and that the lack of black teachers in the suburbs discourages blacks from moving to these areas and thereby affects the racial composition of the student body. The Court rejects plaintiffs' arguments for two reasons: first, the evidence does not support plaintiffs' conclusions that there has been discriminatory hiring by the SSDs; and second, there is no credible evidence that a link exists between faculty composition and student body composition.

Because this is not a Title VII employment discrimination suit of an intradistrict nature, plaintiffs had to draw a link between employment practices by the SSDs and the racial composition of its student body thereby implying an interdistrict effect. Plaintiffs' evidence, however, fails to provide that link.

Plaintiffs rely primarily on the testimony of their statistician, Dr. Robert Carlson. Essentially, Dr. Carlson's analysis shows that between 1973 and 1980, ten percent of the teachers available for hire in the metropolitan area were black yet few of the SSDs hired that percentage of minority teachers. The conclusion drawn is that employment decisions (and ensuing racial composition of the faculty) was not a chance occurrence. (Tr. 6448, 6529). While the analysis may eliminate chance as a reason for the number of black hires, it does not provide a basis for plaintiffs' further conclusion that racial animus motivated the districts' employment decisions and that in turn led to an imbalanced student body.

For the following reasons, the Court finds Dr. Carlson's methodology unsound and his conclusions therefrom unpersuasive: first, the analysis *assumes* each district received 10% minority applications; there was *no* evidence of the actual number of applications submitted to each defendant district from which faculty was hired. (Tr. 6506). Second, the analysis did not consider if black applicants turned down job offers (Tr. 6515) or whether there was a personal preference by black teachers to teach children of a particular race. (Tr. 6483). Instead, Dr. Carlson assumed all black applicants would be willing to work in the SSDs. (Tr. 6502). Third, Dr. Carlson did not consider if the KCMSD, or another district, such as Kansas City, Kansas was hiring an inordinately large number of black teachers from the available labor pool, and if so why. (Tr. 6503-04, P. Ex. 721F, Table C). Nor did Dr. Carlson consider disparities in starting salaries among the defendant districts and the KCMSD. (Tr. 6475). Fourth, in determining the number of expected black hires, Dr. Carlson considered both full-time and part-time teachers. In calculating the number of blacks actually

hired, Dr. Carlson only used full-time teachers and disregarded part-timers. (Tr. 6473-74). Fifth, Dr. Carlson did not consider the labor pool members' qualifications to teach particular subjects nor match those qualifications to the needs of each defendant district. Dr. Carlson did not compare the needs of each district, did not compare the curriculum of each district, and did not consider whether the labor pool members were certified to teach in Missouri or Kansas. (Tr. 6469-6476). In fact, Dr. Carlson's opinion was based upon the unproven assumption that black and white teacher applicants had equal training, qualifications, and experience. (Tr. 6485).

Plaintiffs' conclusion that black faculty would attract more blacks to the suburbs was supported primarily by the opinion of Dr. Orfield. His opinion, however, was not based on any reliable study or analysis actually done. (Tr. 15,304, 15,415). In fact, the study upon which Dr. Orfield purportedly relied merely referred to "some" black teachers or staff being present in the district. (Tr. 15,299). And, gauged by that standard, every suburban district qualifies. Moreover, the Court notes that plaintiffs' witness, Dr. Fields, contradicted Dr. Orfield's opinion by concluding that more black teachers in the SSDs would make little if any difference in the number of black students in the districts. (Tr. 2115).

Raytown and Grandview each have more black students than North Kansas City School District, although North Kansas City School District has appreciably more black teachers than either of those districts. (P. Ex. 2967). The evidence in this case, therefore, refutes plaintiffs' conclusions.

The Court finds it would be speculative to conclude there would be more black students residing in the de-

fendant districts if those districts had more black teachers and staff. In any event, plaintiffs have no constitutional right to attend school in a school district with a teaching staff of any particular racial composition. *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757, 762 (6th Cir. 1983). As the Sixth Circuit declared, "[A]ll that the students are entitled to is the 'sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practice.' (citations omitted)." *Id.* at 762 (footnote omitted). The Court notes that the school district in *Oliver* had already been found guilty of discriminatory hiring practices. Certainly, a student's rights in districts not found guilty of constitutional violations (like here) would not be greater.

III. Effects

A portion of plaintiffs' "effect" theory suggests that the SSDs may be included in an interdistrict remedy even absent any finding that they have committed specific constitutional violations. Plaintiffs had to resort to arguing "effect" because they presented no evidence that any of the SSDs acted to cause segregation.

One aspect of this theory, white flight, does not implicate any SSD and must be rejected. There is no evidence that any school official of the SSDs acted to lure white families or to discourage black families moving into their districts. In fact, the Court finds that none of the factual evidence concerning housing implicated any of the school district defendants. Several of plaintiffs' witnesses, Edward Fields, Lucille Bluford and Cleo Muller, testified to having had substantial contact with the SSDs yet none of these witnesses knew of any action by the SSDs which lured white families into those districts. (Tr. 2116, 3127 and 6964).

In fact, as indicated at the outset, none of plaintiffs' witnesses, expert or otherwise, could attribute any change in the housing market to an action by any SSD. A review of some of that testimony confirms this fact.

Plaintiffs called Dr. Gary Orfield as an expert in both school and housing areas. The Court finds that Dr. Orfield's testimony concerning racial transition within the KCMSD has only intradistrict implications. There was nothing in Dr. Orfield's testimony that would constitute credible evidence that any SSD caused or contributed to cause white flight from the KCMSD. (P. Ex. 1778A-G demonstrates no significant white flight effects in any of the suburban districts). Moreover, Dr. Orfield noted that no ethnic group is racially balanced residentially and no one in this field of study apparently advocates a random dispersal of ethnic groups. (Tr. 15,410).

The Court also finds that many of the moves of blacks into the suburbs are accounted for by the desire to live in middle class situations and not necessarily a desire to live in an integrated situation. (Tr. 15,408-10).

Plaintiffs also called Dr. John Kain in connection with their housing case. The import of the Kain analysis was an attempt to portray what the population distribution would be in the Kansas City metropolitan area if all residential location decisions had been made solely on the basis of three factors, family income, family structure, and the presence of children. Dr. Kain attempted to discount the significance of other factors which influence a family's decision on where to live. (Tr. 7473-76). Dr. Kain's decision to use only three variables in his analysis was assertedly based on his knowledge of research in the field of the factors influencing residential

choice. (Tr. 7489). Dr. Kain readily admitted, however, throughout his testimony that many other factors bear on a family's decision of where to reside.

Even accepting Dr. Kain's conclusion that the present racial segregation is due to discrimination, Dr. Kain offered no evidence or opinions tending to show that any actions or inactions of any SSD contributed in any significant way to causing the racial residential separation he described. The Court finds that none of the SSDs did or failed to do anything which had any significant effect on residential patterns in the Kansas City SMSA. His testimony, therefore, does not support plaintiffs' claims for relief against the SSDs.

Another of plaintiffs' expert witnesses was Yale Rabin, a professor of architecture and urban planning at the University of Virginia. (P. Ex. 2871). Although the thrust of Mr. Rabin's testimony was that blacks have been confined within the KCMSD, absolutely no credible evidence pointed to actions by any of the SSDs causing this condition to exist. The Court finds that blacks are not constrained within the KCMSD by any action of the SSDs. Indeed, as discussed *infra*, P. Ex. 53G and other evidence shows that the black enrollments in each of the defendant school districts have increased fairly steadily since 1968. In 1980, 23,434 blacks resided outside of what Mr. Rabin called the "principal contiguous area" on P. Ex. 12A. (Tr. 11,071-72). This was an increase from 1970 of 14,645 blacks. (Tr. 11,074). Mr. Rabin made no attempt to develop the data at the school district level (Tr. 11,080-81), although he could have done so through Dr. Kain's method (P. Ex. 1265H), or roughly by use of township level data. (Tr. 11,083). In any event, the Court finds that this fact refutes Mr. Rabin's barrier

theory to black movement. The Court finds that nothing in Mr. Rabin's testimony tended to establish any facts for which there would be any liability on the part of any SSD.

In regard to Mr. Rabin's testimony concerning relocation matters, the Court finds that the relocations had no significant effect on the racial composition of the enrollment in any SSD. The Court also finds that any racial discrimination resulting from the placement of highways and urban renewal projects are matters with which no school district had any influence, input or control.

Another of plaintiffs' housing experts was Professor Gary Tobin. The Court has considered carefully Dr. Tobin's presentation, and finds that none of the SSDs were shown by Dr. Tobin to have had any significant involvement in housing matters, or any control whatsoever over the private decisions people make as to where to live. The Court also finds that none of Dr. Tobin's opinions demonstrated any significant effect on the racial makeup of any of the SSDs. Dr. Tobin described the growth of the white population in suburban areas between 1950 and 1970, although he, like Professor Rabin, made no attempt to study the growth in any individual school district. He stated that the white population grew by over 224,000 while the population in the City of Kansas City (which includes many areas covered by the SSDs) declined by 72,000. (Tr. 12,982-83, 13,313-15 and P. Ex. 16G). He made no analysis as to the cause of that demographic shift, and there is no evidence that any of the SSDs took any action to lure whites out of the city. The SSDs had no involvement in or influence on the manner in which blacks or whites made residen-

tial decisions. Actions of the KCMSD in assigning children to particular schools may have had an intradistrict effect but those actions were not influenced by any SSD. Nor did those actions have any significant effect on the enrollment of any other SSD.

Part of plaintiffs' evidence of white flight to the suburbs consists of charts displaying the transfer of student records from various KCMSD high schools to surrounding districts over a 15-year period from 1958 to 1973. (P. Ex. 1775B, C, D, E). The following totals reflect the number of records transferred to each SSD and the percentage of total student enrollment that number represents:

SCHOOL DISTRICT	Total Number Transferred	Percentage of KCMSD Enrollment	Percentage of SSD Enrollment
Blue Springs	24	.04	.5
Center	225	.3	4.1
Ft. Osage	9	.01	.2
Grandview	82	.1	1.2
Hickman Mills	350	.5	2.5
Independence	121	.2	.8
Lee's Summit	66	.1	1.1
Liberty	9	.01	.2
North Kansas City	120	.2	.5
Park Hill	25	.04	.4
Raytown	346	.5	2.3

(P. Ex. 1775B, C, D, E, 53G).

Even assuming all students were white (the records contained no race designations) and further assuming they all moved to the SSDs because of racial transition

in the KCMSD schools, plaintiffs' argument still fails. First, there is no evidence that the SSDs enticed these families to move to their districts. And second, regardless of the impetus behind the moves, the numbers involved are too insignificant to have had a segregative impact on the KCMSD or the SSD. White flight is simply not a constitutional violation by any SSD.

In describing the Southeast Corridor, (the direction of extension of the black population from its core), Dr. Tobin stated that by 1980 it had extended into the Raytown, Hickman Mills, Center and Grandview School Districts. (Tr. 12,978-79). Thus, the Court finds that school district boundaries have not constrained black movement in any way. (Tr. 13,367).

Dr. Tobin also testified extensively regarding racially restrictive covenants that were utilized and enforced until 1948. (Tr. 13,005, 13,012-14). There was no evidence such covenants were enforced by the state courts following *Shelley v. Kraemer*, 334 U.S. 1 (1948). Nor was there any evidence that any SSD was involved in the placement or enforcement of any racially restrictive covenant. (Tr. 13,359). Additionally, tremendous housing growth in many suburban areas occurred after 1948 when such covenants were a nullity. The fact that blacks presently live in locations previously covered by restrictive covenants further undermines their significance.

Dr. Tobin also testified regarding FHA practices and their effect on the housing industry. (Tr. 13,081). These practices, however, are totally beyond the control of any particular school district. No connection was made between actions by FHA or other government officials and any SSD official.

Dr. Tobin's other area of analysis concerned the location of public and subsidized housing. He made no analysis, however, of the number of public and subsidized units compared to the total number of units in each suburban district, (Tr. 13,348), or compared to the total population in each district. (Tr. 13,349). Thus, there is no precise way to determine whether the KCMSD has a disproportionate share.

Plaintiffs' Ex. 27 purports to list all public and subsidized housing, and it shows that such housing is available in significant amounts in every defendant school district. The HUD § 8 program is also available in all parts of the metropolitan area. Although Dr. Tobin at first disputed the observations of former HUD director Southerland that there were thousands of lower income units in suburban areas (Tr. 13,350), he later agreed with that fact. (Tr. 13,429-30). Essentially, Dr. Tobin argued that there would be even more blacks living in low cost housing in suburban areas if there were more affirmative marketing and counseling. (Tr. 13,239-40). Nevertheless, these matters are totally beyond the control of any school district. Furthermore, such an opinion overlooks Parvin Estates, a § 236 subsidized project in the NKC district, where Mrs. Ruth Schecter, one of the project's organizers, engaged in extensive marketing efforts with little success. (Tr. 12,542-43, 12,581-82, 12,584). Despite the affirmative marketing efforts advocated by Dr. Tobin, Parvin Estates has only been able to attract a 7 to 12% minority. Dr. Tobin had not considered those matters in giving his opinions. (Tr. 13,273-74).

Mrs. Schecter stated her expert opinion that a dual housing market existed and that to some extent it continues. (Tr. 12,339). The programs and practices she

described, however, involved private real estate brokers (Tr. 12,339-40), and speculators (Tr. 12,377). She also blamed various HUD programs such as FHA (Tr. 12,369, 12,376), § 235 (Tr. 12,371) and subsidized housing (Tr. 12,382, 12,386), as well as highways and urban renewal; none of her opinions were based on actions by any particular SSD.

Another expert witness on the housing matter was journalist Charles Hammer. Most of Mr. Hammer's testimony concerned actions within the KCMSD; he did not identify any SSD as having any connection whatsoever with racial turnover in southeast Kansas City neighborhoods. He attributed fault to real estate brokers (Tr. 12,008), urban renewal, highways, and FHA. (Tr. 12,025, 12,040 and 12,044-45).

To the extent, if any, that the racial composition of the KCMSD is the result of steering and blockbusting practices by private real estate agents, both black and white, (Tr. 1930-33, 3103-04), the Court finds that these actions of private individual real estate agents are not actions of the KCMSD or of any SSD, and are beyond the control of any school district. (Tr. 1927-28). The Court finds that the SSDs played no role in initiating, sanctioning, or perpetuating blockbusting, steering or red lining activities. (Tr. 1927-31, 1935). Ms. Lucille Bluford, the editor of the black newspaper, *Kansas City Call*, noted that the transition of neighborhoods from white to black and accompanying white flight had existed in Kansas City since the 1940's (Tr. 3001, 3004) yet there was no testimony that linked the SSDs with this process. The Court finds that people moved for a variety of reasons, including a desire to be with people of like religious and racial characteristics. (Tr. 2034-35). There was no

testimony that the SSDs contributed to those private preferences and decisions. (Tr. 3125).

A substantial number of black families have moved into the SSDs during and after the 1960's. (Tr. 439, 667, 1559-60, 1702-03, 1724, 2062, 2103, 2351, 3125-26, 4869-71, 6810, 7095 and 7097). Many of these black families moved into those districts from locations inside the KCMSD. (Tr. 439, 6810, 6968).

With the exception of Liberty, the percentage of black students in each of the SSDs has increased since 1968 and, as the following chart displays, the increase has sometimes been dramatic:

SCHOOL DISTRICT	Percentage of Black Students 1968	1982	Percentage of Student Enrollment 1968	1982
Blue Springs	0	162	0	1.9
Center	3	327	.1	10.6
Ft. Osage	2	25	0	.4
Grandview	32	494	.6	9.8
Hickman Mills	29	1,497	.2	16.7
Independence	141	140	.9	1.2
Lee's Summit	1	N/A	0	N/A
Liberty	124	101	3.4	2.7
North Kansas City	0	153	0	1.0
Park Hill	23	N/A	.4	N/A
Raytown	0	673	0	7.6

(P. Ex. 53G).

Although the percentage of black students in Liberty declined slightly from 1968 to 1982, that decline cannot be attributed to massive white flight to Liberty. In fact the raw numbers show that Liberty only had 28

more white students in 1982 than it did in 1968, an increase of only .79% over fourteen years. (P. Ex. 53G).

Based on the evidence presented, the Court is compelled to find that no SSD in any significant way influenced the housing patterns in the Kansas City metropolitan area. And, as discussed *supra*, the Court rejects plaintiffs' "effects" theory that liability may be placed upon the SSDs for being the recipients of people moving for whatever reason. Absent a nexus between conduct of the defendant SSDs and the housing actors, the Court will not find the SSDs liable for racial imbalance that may be attributed to policies or practices of independent housing actors. *Bell v. Board of Education,* 683 F.2d 963 (6th Cir. 1982).

FINDINGS APPLICABLE TO INDIVIDUAL DISTRICTS

Blue Springs

No evidence of racial motivation was presented regarding the formation of the district which, by popular vote of eleven rural districts in 1949, became the Blue Springs Reorganized School District No. 4. (P. Ex. 255, 525).

Plaintiffs have adduced no evidence that the boundaries of the defendant district were discriminatorily drawn. The Board of Education did pass a resolution dated July 25, 1975 that opposed any measure that would change, divide or enlarge its existing boundaries. (P. Ex. 2125). Although KCMSD is mentioned in the resolution, the Court finds this was only a vote for local control; there is no evidence of discriminatory purpose or impact. In

any event, the resolution had no effect; the people could have ignored it and petitioned and voted for a change in boundaries.

There were some black families living in the small rural districts which were later reorganized to form the defendant district. All were farmers (Tr. 883, 914, 935, 951-52, 964, 5308), and the closest school for blacks was the Young School in Independence. The enumeration data shows only five black children located in the small rural districts between 1911 and 1943. Even assuming these children were transferred to Independence or Kansas City for school, the Court finds there is insufficient evidence that the transfers had other than a *de minimis* impact on any other school district. All the black families were gone by 1943.

In 1971, the Blue Springs District joined the Cooperating School Districts Association of Suburban Kansas City to increase buying power, influence legislation, and share new education ideas (P. Ex. 1700, Depo. Vol. II at 46). The Court concludes that Blue Springs' participation in this organization did not discriminate against the KCMSD or its students.

Blue Springs participates in the Ft. Osage AVTS as do the Grain Valley and Oak Grove Districts (not defendants herein). (P. Ex. 34 and 1709). The Court finds no racially discriminatory intent accompanied the founding of the Ft. Osage AVTS nor Blue Springs' participation therein. (*See also* individual section regarding Ft. Osage, *infra*).

The only other interdistrict student involvement relating to Blue Springs is the operation of a Blind-Deaf

Center that educates children from both Blue Springs and other districts. (P. Ex. 1720). Non-resident transfers to the Center are accepted on a space-available basis. (P. Ex. 1720). There is no evidence of any discriminatory intent nor effect on any of the defendant districts by the operation or participation in the Blind-Deaf Center.

Such matters as the 1/2% sales tax and House Bill 171 are irrelevant to Blue Springs because the district is not within the city limits of Kansas City. (Tr. 6204, P. Ex. 1767 and 1999). Nor is it contiguous to the KCMSD. (P. Ex. 37).

While there are few black faculty or staff employed in the defendant district, there is no evidence that the teachers are hired on other than their qualifications. (P. Ex. 982 and 2967). As more fully set forth in the general findings *supra*, interdistrict employment discrimination, even if found to exist, has little if any bearing on the racial composition of defendant districts and therefore has little relevance to this litigation.

There is no evidence that the Blue Springs School District acted to prevent blacks from obtaining housing in the district with an intent to discriminate. Even if Dr. Tobin's map depicting restrictive covenants in Blue Springs is found to be accurate, (P. Ex. 22), they had no effect because most of the residential development in the area occurred after the Supreme Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Having failed to establish any intentional racially discriminatory act or omission by these defendants which has had a substantial segregative impact in any other school district, the Court will sustain the Rule 41(b) motion filed by Blue Springs and its superintendent.

Center

The present Center School District consists of territory formerly occupied by the Center, Dallas and Boone districts. Dallas and Boone were grade school districts and sent their high school students to Center when space was available. (Lehman Depo. at 16). The present boundaries and the annexations that occurred were not racially motivated. (*See*, e.g., P. Ex. 405). The district is situated south and is contiguous to the KCMSD. (P. Ex. 37). Center did support passage of Senate Bill 29 in 1963 which changed the law so that annexation elections would be more difficult to call but their position was prompted by the fact that eight elections had been called from the late 1940's until the early 1960's to annex Center to the KCMSD. Each election, held at the district's expense, had failed by a large margin. (Bondurant Depo. at 13, 74, 49). The Court finds the position taken by Center was not racially motivated and had no segregative effect.

There is no evidence that Center had any black residents at any time prior to 1954. (Lehman Depo. at 83). The records do show the following number of high school students residing in areas now encompassed by Center attended the KCMSD for the years indicated: 1949-50, 37; 1950-51, 38; 1951-52, 39; 1952-53, 42; 1953-54, 77; 1954-55, 116. (P. Ex. 1770). Even if the Court were to assume all these children were black, they are of insufficient number for the Court to conclude they had a substantial segregative effect on either district. The Court therefore determines that for space reasons or other reasons not apparent from the evidence, some Center students attended the KCMSD; none of the transfers, however, were racially motivated. (Lehman Depo. at 29). There is no evidence that Center at any time failed to permit black children

residing in the district to attend its schools, treated black children attending Center schools differently because of race, assigned students on other than a racially neutral basis, denied admission to any black student on the basis of race, or in any other way conducted itself in a racially discriminatory manner. Center never operated a dual school system and, therefore, no vestiges remain to dismantle.

Over the past decade, Center's minority population has grown significantly. Presently, over 12% of the student population is black. (P. Exs. 53G, 983, and 2967). This growth substantiates the Court's findings there are no unconstitutional barriers to black residents or students in the Center District.

As explained in the general findings, the Cooperating School Districts Association of Suburban Kansas City, of which Center is a member, was not formed and does not operate with a racially discriminatory purpose. (Tr. at 4832). The organization has had no racially segregative effect in any district.

Because the district is presently located within the Kansas City city limits, (P. Ex. 425), it chose to support and share in the 1/2% city tax. (P. Ex. 2177). As discussed regarding all districts *supra*, Center's cooperation with the City in this manner was in no way racially motivated.

Because of a lack of facilities in the district, Center sends its handicapped and other special education students outside the district, often to the KCMSD. (Lehman Depo. at 61). These transfers are made for sound educational reasons, are racially neutral, and are insignificant in number.

Center participates in the Herndon AVTS located in the Raytown School District. There is no evidence that Center refused to participate in the KCMSD's vocational technical school or that the KCMSD ever offered the opportunity to participate.

Support of H.B. 171 and opposition to the Spainhower plan were for reasons of local autonomy. (Lehman Depo. at 77-79). There is no evidence whatsoever that Center's position on either issue was racially motivated.

Center employed its first black teachers in 1978. (P. Ex. 984). There is no evidence that Center has ever discriminated against any applicant for employment on the basis of race. Nor is there any evidence that any black applicant for employment in Center has ever been refused employment. The only evidence regarding Center's employment practices are the statistics from plaintiffs' statistician, Dr. Roger Carlson. And, as discussed at length *supra*, his statistics and opinions are based on the availability of teachers in the entire SMSA rather than on the number of applicants to each defendant district. The Court therefore finds his opinions unpersuasive. Further, as more fully explained in the general order, there is insufficient evidence that the racial make-up of Center's staff has in any way influenced housing choices of either race. The Court finds that Center's hiring practices have had no effect whatsoever on the racial composition of the student body of Center or that of the KCMSD.

In regard to housing, the Court finds there is no credible evidence that Center School District took any action or position which prevented any black family from moving to the district. Nor is there any credible evi-

dence that Center took any action or position which enticed or lured any white family from the KCMSD to Center. The map prepared by Dr. Tobin, plaintiffs' expert, (P. Ex. 22), shows that there were racially restrictive covenants in the Center School District, but there is no evidence which tends to prove that Center had any complicity in the placement or enforcement of those covenants nor is there any evidence that any black family failed to move to Center because of those covenants. The continued increase in the number of blacks enrolled in Center (*see, e.g.*, p. Ex. 53G, and 983), is convincing evidence that there is no barrier to blacks moving to the Center District nor is there any present effect of any past practices which may have had a discouraging effect on black moves.

Having failed to establish any intentional racially discriminatory act or omission by these defendants which has had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by Center and its superintendent.

Fort Osage

The Ft. Osage Reorganized School District R-1 was created in 1949 by a popular vote of the people residing in the area. (P. Ex. 538). The proposed reorganized district included the former Buckner and Levasy High School Districts and sixteen other rural districts. In 1951, three more rural school districts annexed to Ft. Osage, (Gragg Depo. Ex. FO32), and in 1972, the Courtney School District voted to annex to Ft. Osage. (Gragg Depo. at 61-62). The Court finds the reorganization and annexations were not racially motivated. Ft. Osage is not contiguous to the KCMSD. (P. Ex. 37).

There was some evidence that a small number of black families lived around Sibley, now part of the Ft. Osage district, well before 1954. There is no evidence that Ft. Osage or any of its predecessor districts educated its black students in separate schools. Instead, the predecessor districts transferred those two or three black students to the KCMSD. (Tr. 5960). These few transfers did not have any segregative effect on any district. If any blacks left Ft. Osage or its predecessor districts, or failed to move to such areas from 1910 to 1954 because no black school was maintained, plaintiffs have failed to prove their numbers were other than *de minimis*. (Tr. 5960).

By 1954 there were no blacks living in the Ft. Osage School District. In 1968, two blacks had enrolled in the school district; by 1982, there were 25 blacks enrolled. (P. Ex. 53G). All students, regardless of race, attended the one high school located in the district. (P. Ex. 2967). There is no evidence of discrimination against any blacks attending the Ft. Osage schools. (Gragg Depo. 220-222).

At one time, Ft. Osage's orthopedically handicapped students attended the Delano School in the KCMSD because Ft. Osage had too few students with such handicaps to provide adequate teaching facilities within the district. (Gragg Depo. at 134-35). Presently, these children attend school at the Independence Comprehensive Special Education Program, (Gragg Depo. at 136), which is much closer than the Delano School. Ft. Osage's blind students attend the Blind-Deaf Center in Blue Springs school rather than the Troost School in the KCMSD, again because it is considerably closer to the students' homes. (Gragg Depo. at 137). The Court finds that these educational transfers did not have any effect on the racial

composition of Ft. Osage or any other school district. Nor are they racially motivated or administered.

The Ft. Osage AVTS opened in 1968 accepting students from the Ft. Osage, Blue Springs, Grain Valley and Oak Grove School Districts. (Bartow Depo. at 94). The Grain Valley and Oak Grove districts are not parties to this case and none of the participants is contiguous to KCMSD. (P. Ex. 1709, Gragg Depo. Vol. 2 at 43). Ft. Osage decided to build the AVTS within its district because it had unused bonding capacity. (Bartow Depo. at 101). As discussed in the general findings, Ft. Osage did not join with the KCMSD AVTS because it was too far away. (Tr. 6215). No school district other than those currently participating in the Ft. Osage AVTS, including the KCMSD, ever asked to participate in the Ft. Osage AVTS. (Bartow Depo. at 100, Gragg Depo. at 93-94 and Vol. II 2 at 96). The Court finds that the formation and operation of the Ft. Osage AVTS does not constitute a violation much less a significant interdistrict violation. Nor does state funding of the Ft. Osage AVTS unfairly impact on the funding of the KCMSD AVTS. (Tr. 6407-08).

Notwithstanding its affirmative action policy statement, the district has yet to employ a black teacher or staff person. (P. Ex. 2967). In recent years, Ft. Osage has entered into written contracts with black teaching candidates but, on each occasion, the candidates have decided to pursue other alternatives. (P. Ex. 2967 and Gragg Depo. at 225). Plaintiffs' evidence of employment practices, based entirely upon Dr. Carlson's analyses, did not consider this fact. (Tr. 6514). Moreover, as set forth more fully in the general findings, there is simply no credible evidence that the presence of more black teachers

or administrators in Ft. Osage would have had any significant impact upon the racial composition of the students enrolled there.

Plaintiffs did not present proof that the Ft. Osage School District acted to prevent blacks from obtaining housing in the district nor in any way encouraged whites to do so. The map of restrictive covenants prepared by plaintiffs' expert, Dr. Tobin, located no such covenants in the Ft. Osage School District. (P. Ex. 22). There is no evidence that Ft. Osage ever opposed subsidized or other low cost housing of any kind in its district, and the Court finds such public and subsidized housing presently exists. (P. Ex. 27). The district's only involvement in zoning plans was its opposition to a planned liquor store near the Ft. Osage High School, (Gragg Depo. at 54-56, 58), and was not racially motivated.

The Court finds that Ft. Osage did not take a position on the Spainhower report. (Bartow Depo. at 152). Additionally, because none of the Ft. Osage School District lies within the limits of the city of Kansas City, House Bill 171 and the 1/2% sales tax have no relevance to this defendant.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by the Ft. Osage School District and its Superintendent.

Grandview

Plaintiffs' expert, Dr. James Anderson, established that no black persons resided in Grandview prior to

1954. (Tr. 5959, P. Ex. 37A). Therefore, Grandview never transferred any black students to the KCMSD. The Court finds that Grandview has never operated a dual school system and accordingly there are no vestiges to dismantle. The district is situated to the south but not contiguous to the KCMSD. (P. Ex. 37).

Currently the school district has a black enrollment of 10.1%. (P. Ex. 2967). Plaintiffs' expert, Dr. John Kain, predicted virtually the same proportion of black students would be expected in the school district in the absence of alleged discrimination (Tr. 8066). These figures confirm that, contrary to plaintiffs' arguments, there are no barriers preventing blacks and other minorities from moving to Grandview. All students, regardless of their race, meeting the established and racially-neutral residency requirements of the Grandview School District, have always attended school in that district.

Over the years, handicapped children or other students with special educational needs have attended special schools in other districts, mainly the KCMSD, (Strode Depo. at 23, Staires Depo. at 27-28 and Harrison Depo. at 91), because Grandview did not have adequate facilities to provide for them (Strode Depo. at 35). These transfers were for the sole purpose of accommodating the needs of its handicapped students (Staires Depo. at 27 and Strode Depo. at 23); there is no evidence of racial discrimination.

Grandview participates in the Herndon AVTS located in the Raytown School District. Grandview's participation in Herndon was administratively reasonable and proper and was not racially motivated: Herndon is located much closer to Grandview High School than is

the KCMSD vocational education facility. Grandview is adjacent to the Raytown School District, but does not border on the KCMSD. Further, there was no evidence to show that the KCMSD invited or suggested to Grandview that it participate in the KCMSD's existing vocational program.

Grandview's opposition to the Spainhower recommendations was not related to race or any alleged potential for consolidation with the KCMSD (Strode Depo. at 35, Staires Depo. at 46 and Harrison Depo. at 115). Grandview opposed some of the Spainhower recommendations because it believed them to threaten local board autonomy. (Staires Depo. at 46, Strode Depo. at 75 and P. Ex. 3240).

The only evidence offered by the plaintiffs to support their allegation that Grandview discriminated in hiring came from the plaintiffs' expert witness, Dr. Roger Carlson. In addition to the other flaws in his analysis, Dr. Carlson's data was inaccurate as applied to Grandview. For example, Dr. Carlson reported that Grandview hired three black teachers between 1973 and 1980 (P. Ex. 721F, Table G), yet plaintiffs' other evidence shows that Grandview hired five black teachers during that period. (P. Ex. 988 and 2967, Harrison Depo. at 76). Notwithstanding the variation, the racial composition of the faculty and staff of Grandview has not affected the racial composition of the students attending Grandview. (See general findings *supra*).

Plaintiffs did not present proof that the Grandview School District acted to prevent blacks from obtaining housing in the district with an intent to discriminate. The map of restrictive covenants prepared by plaintiffs'

expert, Dr. Tobin, located very few such covenants in Grandview. (P. Ex. 22). Moreover, the Court notes most of the residential development in Grandview occurred after the Supreme Court, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), eliminated the effect of such covenants.

There is no evidence that Grandview did anything to lure white students or to discourage black students from moving to Grandview. The school district studied residential development to assist in enrollment projections and was interested in housing and zoning matters because of their effect on the tax base. The district opposed the development of trailer parks because they are assessed as personalty for tax purposes. There is no evidence that any such action was intended to or had the effect of discouraging blacks from residing in the district.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by the Grandview district and its Superintendent.

Hickman Mills

The Hickman Mills School District was created as a result of a consolidation law passed in 1902. (Nesbit Depo. at 49). In the 1960's, there were two boundary disputes involving Hickman Mills: one with Center School District and one with the Grandview School District. In each case an election was held and the voters of Hickman Mills voted not to give up the land; the land involved in the Center dispute was granted to Center School District by a board of arbitration and the land involved in the Grandview dispute remained with Hickman Mills. (Nesbit Depo. at 57). Neither of the boundary disputes

were racially motivated or had any racially discriminatory effect.

In 1964, an annexation election was held for the purpose of determining whether or not Hickman Mills should be annexed to the KCMSD and the proposal was defeated. (Tr. 4764-65, Wall Depo. Vol. I at 23). The Board of Education of Hickman Mills and its administrators adopted a neutral position on the issue. (Tr. 4765). Although race may have been an issue in the minds of some individual voters, (Tr. 4761-62), the primary reasons in favor of annexation to the KCMSD were financial ones, (Nesbit Depo. at 144-145), and the primary reasons against annexation concerned retention of local control of the schools. (Nesbit Depo. at 145). To the extent that race was an issue with some voters in the annexation election, the racial issue was not in any way caused by any action of the school district. The Court notes that at the time of the annexation election, the KCMSD was 65.2% white, (Def. Ex. K2), and the Hickman Mills district is not contiguous to the KCMSD. (P. Ex. 37).

Hickman Mills had no blacks living within its boundaries at any time prior to 1954 or at any time between 1954 and the mid-1960's. (Tr. 4620, P. Ex. 1785, Wall Depo., Vol. I at 35, Nesbit Depo. at 19). Without black residents, there could not have been transfers of black school children to any other district nor the operation of dual schools for black and white children. Plaintiffs have failed to show the absence of a school for black children within Hickman Mills precluded any blacks from settling there. The Court finds Hickman Mills has always and continues to operate a unitary school system.

The black enrollment percentage of Hickman Mills School District has grown from less than 1% in 1968 to

18.02% in 1983. (P. Ex. 53G, 2967). The 18.02% black enrollment figure exceeds the 14.53% black population of the Missouri portion of the SMSA, and one of plaintiffs' experts, John Kain, stated that the Hickman Mills School District had reached the percentage black enrollment he predicted would have occurred if there had been no race discrimination. (Tr. 8060, P. Ex. 53G, 1265F'). Black occupancy has increased in every census tract within Hickman Mills in the past decade. (P. Ex. 1, 9, and 36). Every elementary school within Hickman Mills has steadily gained in the number of blacks enrolled over the period 1968 to 1982; in 1968, 13 blacks were enrolled in the elementary schools and by 1982 that number had increased to 757. (P. Ex. 1865A).

There were several post-1954 complaints regarding alleged disparate discipline of black and white students and a need for improved race relations. (Tr. 5126-27, 9629-30). The complaints occurred between 1967 and 1983, a time period within which the black enrollment of the district jumped from 29 to 1,571 students. (P. Ex. 53G, 2967). There was no evidence that these intradistrict complaints had any segregative effect within Hickman Mills or in any other defendant school district.

On October 27, 1979, the Office for Civil Rights, following a compliance review of the pupil assignment practices of Hickman Mills, notified the district it was not in compliance with Title VI of the Civil Rights Act of 1964. Eleven classes were found to have minority students in excess of OCR's acceptable range and required the reassignment of 1,268 black students in 1979-80. (P. Ex. 2444, 2967). One day later, Hickman Mills responded by letter that the pupils had been assigned randomly by computer and the district immediately

agreed to make necessary adjustments to correct the imbalance. The OCR was justifiably satisfied and this intradistrict incident had no discriminatory effect on any other school district defendant. (P. Ex. 53G, 2967).

The Cooperating School Districts Association of Suburban Kansas City, of which Hickman Mills is a member, (Wall Depo. Vol. 1 at 41-42), does not operate with a racially discriminatory purpose. Its main functions are bulk buying power, a forum for discussing education issues, (Tr. 4832), and trying to influence legislation. As discussed in the general findings, there has been no evidence that any action taken by the organization has had an interdistrict segregative effect on any school district defendant.

Because a large portion of the district is within the Kansas City city limits, it chose to support and share in the 1/2% city tax. (P. Ex. 2177). As discussed in the general findings *supra*, cooperation with the city in this regard was not racially motivated.

Hickman Mills has cooperated with other defendant school districts, including the KCMSD, to provide for the education of its handicapped and special education students. (P. Ex. 1949, Wall Depo. Vol. II at 12-15). Records indicate the nonresident transfer of students in 1976 (race unknown) to special education/handicapped schools in the KCMSD, or to the Herndon AVTS. (P. Ex. 1949). The number of such transfers is *de minimis* and again has had no segregative effect on Hickman Mills, the KCMSD or any other school district defendant.

Hickman Mills established a program for partially sighted and hard of hearing students and receives children from Grandview, Raytown, Lee's Summit, Center

and Belton (nondefendant). There is no hint these children are received on other than a racially neutral basis. (Nesbit Depo. at 204-05).

Hickman Mills participates in the Herndon AVTS in the Raytown School District. (Nesbit Depo. at 169). The KCMSD did not invite nor suggest to Hickman Mills that it could participate in KCMSD's area vocational school. (Nesbit Depo. at 169). Hickman Mills' involvement in the Herndon AVTS has had no interdistrict segregative effect on any defendant school district in this case.

Hickman Mills opposed the Spainhower report because it, like other districts, feared the plan would result in a loss of local control of schools. (Nesbit Depo. at 173 and 178). There is absolutely no evidence that Hickman Mills' opposition to the plan had any effect on the racial composition of any school district defendant.

In regard to faculty, there is no evidence that Hickman Mills failed to hire any qualified black teacher who applied for a job with the district. Outside of the testimony of Ms. Betty Sapp, discussed *infra*, plaintiffs relied on the statistical calculations and conclusions of Dr. Roger Carlson. There is a variance between the number of black teachers hired by the school district as reported and analyzed by Dr. Carlson (P. Ex. 721F, reporting 8) and plaintiffs' other evidence: the EEO-5 forms for 1977 and 1978 (P. Ex. 990, reporting 9), and defendant's answers to interrogatories for the years 1977 through 1979 (P. Ex. 2967, reporting 11). Regardless of the number selected, the Court finds no correlation in Hickman Mills between the number of black teachers and the number of black students enrolled in the district. As

more fully set forth in the general findings, employment practices and composition have no bearing on the racial composition of the student body and therefore no relevance to this litigation.

Ms. Betty Sapp, a former black teacher with Hickman Mills School District, alleged there were unfair disciplinary and class assignment practices regarding blacks at one junior high school. Ms. Sapp had also filed an employment discrimination charge against the district which was settled without litigation. Ms. Sapp's testimony that three black teachers besides herself were not rehired in 1979 (Tr. 8792) is contrary to the weight of the evidence. (P. Ex. 990, 2967). Even without questioning the witness' veracity, her allegations of discrimination are of an intradistrict nature, having no relevance to the issue of interdistrict liability.

There is no evidence that the Hickman Mills School District caused or contributed to cause housing discrimination within its boundaries. The map prepared by Dr. Tobin (P. Ex. 22), shows there were restrictive covenants in the Hickman Mills School District, but there is no evidence which tends to prove that the school district had any complicity in the placement or enforcement of those covenants. Nor is there any evidence that any black family failed to move to Hickman Mills because of those covenants. The continued and substantial increases in the number of blacks enrolled in Hickman Mills (*see, e.g.*, P. Ex. 53G, Ex. 990), is convincing evidence that there is no barrier to blacks moving to the Hickman Mills School District nor is there any present effect of any past practices which may have had a discouraging effect on black moves. (Tr. 13,368-69).

Opposition by the Hickman Mills School Board to the rezoning of certain properties for trailer courts or apartment projects was premised on their belief that the tax revenues from such developments were insufficient to adequately support the per pupil expenditures for children from those developments. (Nesbit Depo. at 107, Wall Depo., Vol. II at 50-51). There is no evidence that any opposition was race related.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by Hickman Mills and its superintendent.

Independence

All of the Independence School District is situated in Jackson County, Missouri and includes the majority of the City of Independence, and a very small portion of the cities of Kansas City and Sugar Creek. (P. Ex. 37, 150). It lies directly east of the KCMSD and borders the Van Horn attendance area. (P. Ex. 36B). The Van Horn attendance area includes the former Rock Creek Elementary School District, the Sugar Creek Elementary School District and the Pitcher-Fairview Elementary School District. (Tr. 6120). Currently, the Van Horn attendance area is, with small exception, completely within the limits of the City of Independence. (P. Ex. 36). The Sugar Creek District annexed to the KCMSD in 1955. The Rock Creek School District joined the KCMSD in 1957 and the Pitcher-Fairview District joined the KCMSD in 1958. (Tr. 6120, P. Ex. 407). All students in the Rock Creek, Pitcher-Fairview and Sugar Creek school districts were white. (Tr. 1976). Each of these districts has con-

tinuously remained a part of the KCMSD since annexing to it.

In 1971, a group of KCMSD patrons living in the Van Horn attendance area initiated a proposal to de-annex the Van Horn High School attendance area from the KCMSD and to annex it to Independence. (Tr. 1975-76, 6155-60). These KCMSD patrons obtained a sufficient number of signatures to call for an election in both districts. A number of reasons unrelated to race contributed to this proposal to change the boundaries. (Tr. 6156, Goodrich Depo. at 30). The voters in KCMSD defeated this proposition while the voters in Independence approved it. (Goodrich Depo. at 32). Because of the variance, the proposal was presented to a board of arbitration who decided not to approve it, thereby keeping the Van Horn attendance area in the KCMSD. (Goodrich Depo. at 32). The Court finds this boundary proposal was handled according to the requirements of the applicable and racially-neutral Missouri statutes. Whatever the intent of the patrons proposing the change may have been, there is no credible or persuasive evidence that the KCMSD, the Independence School District, the state or any other governmental official or entity acted with any racial animus. The Van Horn attendance area has continuously remained in the KCMSD. Even if this proposed change was racially motivated, there has been no effect on the boundaries or racial composition of the KCMSD, Independence, or any other school district. (Tr. 2054-55).

There have been no attempts or proposals to change Independence's boundaries since 1974. Considering all the evidence, the Court finds the Independence boundaries were formed and maintained for racially neutral reasons; the district has never annexed or failed to annex any

territory for any reason related to race. The current boundaries are racially neutral and unitary in all respects.

There is a well-established stable black community in the Independence School District, primary centered in the City of Independence. (Tr. 4570-71). Because of state-mandated segregated schools, black children, from 1866 until integration, attended the Douglass School (later renamed Young). (P. Ex. 39). The black school offered only elementary classes until it added ninth grade in 1920, tenth grade in 1934, and eleventh and twelfth grades in 1935. (P. Ex. 39). In 1945, the high school portion was closed and those students were transported to the KCMSD. Young continued to operate elementary classes for black children until 1957. (P. Ex. 39).

The following chart indicates the number of blacks of school age enumerated and enrolled in Independence for the school years shown:

School Year	Enumerated	Enrolled Elementary	Enrolled High School	Enrolled Total
1930-31	235			153
1931-32	246	182	19	201
1932-33	238	174	12	186
1933-34	242	168	18	186
1938-39	225	144	52	196
1939-40	219	127	56	183
1940-41	207	123	49	172
1941-42	258	104	51	155
1942-43	251	103	53	156
1943-44	248	85	42	127
1944-45	236	78	42	120
1945-46	226	75	*	75
1947-48	151	97		97

School Year	Enumerated	Enrolled Elementary	Enrolled High School	Enrolled Total
1948-49	161	108		108
1949-50	160	106		106
1950-51	157	104		104
1951-52	142	108		108
1952-53	151	110		110
1953-54	147	124		124

***In 1945, the Young High School closed and students were transported to the KCMSD. (P. Ex. 39).**

See P. Ex. 1787. Independence paid the tuition and transportation for the black high school students transported to the KCMSD. (Tr. 1719, Plucker Depo. at 50 and Ex. 5 thereto). From 1945 to 1954, approximately 100 such transfers occurred. (Tr. 4560). Even if all such transferred students moved from Independence to the KCMSD, the Court finds they are of insufficient number to have had a substantial effect on the racial composition of Independence or the KCMSD. The few transfers between Independence and the KCMSD for this nine year period was not a direct and substantial cause of the racial composition of the KCMSD, Independence or any other school district. The Court also finds that the number of blacks, if any, that left Independence over the 1945 to 1954 time period because the black high school was not maintained is *de minimis*. Assuming all blacks who lived in Independence and attended high school in the KCMSD left Independence, went to the KCMSD, and did so because there was no black high school in Independence, the Court finds that any such migration has had no significant effect

on the racial composition of the KCMSD, Independence or any other school district defendant.

All transfers between Independence and the KCMSD stopped immediately after *Brown*. On July 8, 1954, the Independence Board of Education adopted a resolution to accept all its black students of high school age, that is grades 9 through 12, in its junior high and high school in the fall of 1954. (P. Ex. 2254 and Plucker Depo. at 79, 82). Between 1954 and the 1957-58 school year, the remaining grades were integrated. (P. Ex. 2254, 3317 and Plucker Depo. at 85-86). The plaintiffs' expert, Dr. Orfield, testified that gradual integration of black students over a few years after *Brown*, had no significant effect. (Tr. 14,926). The Court agrees and finds that the operation of the Young school for elementary students for a short period after 1954 had no significant effect on either Independence or the KCMSD. Independence fully and adequately discharged its affirmative duty under *Brown* by 1957-58, and there are no vestiges of the prior dual school system remaining.

The Independence School District experienced a steady growth in total enrollment from 1950-51 to 1970-71, when it peaked at 16,801; enrollment has steadily declined since. (P. Ex. 15A, 991B, 2967). Black enrollment, in that peak year, was 145 students or .9% of the total. (P. Ex. 53G, 991 and 991B). While the total black enrollment in 1982 was actually five less than in 1970, because of the declining white enrollment black students comprised 1.2% of the total student enrollment. (P. Ex. 53G, 991).

There is no evidence that students are assigned to schools within Independence on a racially discriminatory

basis. Nor is there evidence that Independence discriminates in providing facilities, extracurricular activities, transportation, or any other student service.

Independence is a member of the Cooperating School Districts Association of Suburban Kansas City, an organization providing legislative information and group price discounts. (Goodrich Depo. at 32-34). As reiterated in the general findings, there is no evidence that this organization was formed to act or has, in fact, acted in a racially discriminatory manner. Nor is there evidence that this group was formed to harm, or has harmed, blacks or the KCMSD.

Because a portion of the Independence School District is within the municipal boundaries of the City of Kansas City, Independence supported and shared in the proceeds from the city's 1/2% sales tax. (P. Ex. 1999). As with other school district defendants, there is no indication that Independence's agreement to share in this tax was in any way racially motivated. (*See*, general findings at 20-21).

In regard to special education, Independence has cooperated with a number of school districts to provide a broader range of educational programs to meet the needs of particular students. Independence sent its handicapped and special education students to various schools in the KCMSD, including the Delano School, when Independence did not have proper facilities to educate them. (Goodrich Depo. at 146). Subsequently, Independence stopped sending its handicapped students to the KCMSD because of the hardship on the students. (Goodrich Depo. at 146-48). Today, Independence provides special education for the physically and mentally handicapped in

its own district. Visually handicapped children participate in the Blind-Deaf Center operated by the Blue Springs School District. (Goodrich Depo. at 146-48). There is no evidence that any of these cooperative endeavors for students with special educational needs were or are motivated by racial animus or had a racially segregative effect.

Prior to 1971, Independence provided vocational education at schools within its district. (Plucker Depo. at 118-19). Then, in 1971, the Raytown School District invited Independence to participate in its AVTS (P. Ex. 1537), and Independence agreed. (Peters Depo. at 111). The Court finds that the KCMSD did not invite or suggest to Independence that it could participate in the KCMSD's AVTS. (Goodrich Depo. at 150). The Court further finds that the KCMSD wanted to operate its own AVTS and had substantially completed the steps necessary to do so before Independence or any other school district contemplated participation in the Raytown AVTS. (Tr. 6221-22, 6360-62). (*See also*, vocational education, general findings, *supra*). There is no credible evidence that Independence's decision to participate in the Raytown AVTS and not to participate in any other AVTS was motivated by any racial animus.

The Spainhower plan was discussed and opposed by the Independence Board of Education because of its proposed elimination of local control of schools. (Peters Depo. at 71).

Due to the small portion of the Independence School District that is contained within the city of Kansas City, it would have been virtually unaffected by House Bill 171. (P. Ex. 36).

In regard to employment practices, Independence has hired teachers of all races on the basis of ability, the number of openings, and the number of applications. Independence has employed black teachers throughout its history. (P. Ex. 2967, Plucker Depo. at 119). All black teachers employed by the Independence district before the *Brown* decision were integrated into the district's faculty in the secondary schools. (P. Ex. 2255). No black teacher was fired, demoted or treated unfairly in any fashion. (Plucker Depo. at 120). And while Independence has made a good faith effort to hire every black teacher that applied, (P. Ex. 2967), some qualified black candidates have not applied because the KCMSD's salary schedule was better than that offered by Independence. (Tr. 1768, 6393 and Peters Depo. at 92). Independence has also encouraged black teachers to become administrators and is the only suburban district with a black principal. (P. Ex. 2967). The Court also finds that the proportion of black teachers in Independence is within the "acceptable range" of the "expected number" predicted by plaintiffs' statistician, Dr. Roger Carlson, even though Dr. Carlson did not consider that Independence hired five black teachers between 1973 and 1980. (Tr. 6446 and P. Ex. 2967). Even so, as fully discussed *supra*, there is no substantial or credible evidence that any relationship exists between the racial composition of the Independence faculty and the racial composition of the student body of Independence, the KCMSD or any other school district.

In regard to housing, there has been no evidence that Independence acted to lure or to encourage white families or to discourage black families from moving into Independence. Nor has Independence involved itself in decisions

of other entities relating to zoning or the type or placement of housing to be constructed within its district. (Goodrich Depo. at 63-64, Peters Depo. at 51, Plucker Depo. at 130-31). Independence has never allowed any non-resident white student to transfer to Independence from the KCMSD.

Fred Cioffi, an investigator for HEW, testified that Independence fully cooperated in his investigation of a rumor that there were transfers of white students from the KCMSD to Independence. His investigation found no such transfers. (Tr. 10,156-57).

The Court finds that Dr. Tobin's map of restrictive covenants showed few such covenants in Independence. (P. Ex. 22A). Moreover, there is no evidence that the district had any complicity in the placement or enforcement of those covenants nor is there any evidence that any black family failed to move to Independence because of those covenants. In fact, blacks now live in the neighborhoods which were covered by those restrictive covenants. (Tr. 1734).

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact on any other district, the Court will grant the Rule 41(b) motion filed by the Independence School District and its superintendent.

Lee's Summit

Lee's Summit Reorganized School District R-7 (Lee's Summit) was created in 1949 by a popular vote of the people residing in 18 rural districts that were to comprise the proposed district. (Campbell Depo. at 97). Only two

of the 18 rural districts operated both an elementary school and a high school; none operated a black school. (P. Ex. 150; Campbell Depo. at 72, 87). Neither the Lee's Summit R-7 nor any of its predecessor districts have ever been contiguous with the KCMSD. (P. Ex. 37). The Court finds that the boundaries of the Lee's Summit district and the boundaries of the 18 predecessor districts were not established with a racially discriminatory intent.

With the exception of four minor boundary changes in the 1960's and 1970's, none involving the KCMSD, the Lee's Summit District remains the same today as it was in 1949. The Court finds that those boundary changes were not racially motivated and had no discriminatory impact on the Lee's Summit or any other school district. (P. Ex. 150, 258, 3330, Campbell Depo. at 116-123, Copeland Depo. at 48-50).

There was, prior to 1954, a black community in the City of Lee's Summit in the old Lee's Summit No. 79 District (now a part of the present Lee's Summit School District). (P. Ex. 37A). Many of those families had no children, (Tr. 1208-12, 1216, 1736-37), so there were never more than a few black children in Lee's Summit in the early 1900's. (Tr. 1258-60, 1267). The 1949-50 school enumeration shows only four black families in the district with children. (P. Ex. 1802).

The Court finds that except for one or two black students in only three or four isolated years between 1900 and 1954, no predecessor districts other than old Lee's Summit No. 79 had any black students. (P. Ex. 49). The Court finds that the following is the black enumeration for the old Lee's Summit No. 79 and the Lee's Summit R-7 school district for the years 1915-16 through 1954-55:

School Year	Black Enumeration
1915-1916	1
1920-1921	7
1922-1923	4
1923-1924	4
1924-1925	4
1925-1926	4
1926-1927	4
1927-1928	2
1928-1929	2
1929-1930	4
1930-1931	7
1931-1932	3
1932-1933	5
1933-1934	6
1934-1935	5
1935-1936	6
1936-1937	7
1937-1938	8
1938-1939	6
1939-1940	7
1940-1941	7
1941-1942	7
1942-1943	6
1943-1944	8
1944-1945	8
1945-1946	10
1946-1947	13
1947-1948	12
1948-1949	10
1949-1950	10
1950-1951	8
1951-1952	6
1952-1953	7
1953-1954	6
1954-1955	5

(P. Ex. 1799, 1801, 1802). The number of blacks enumerated gradually increased from 1915 until 1947. After remaining fairly constant for four years, the number gradually declined. Based on this pattern, the Court finds there was no significant depopulation in the Lee's Summit R-7 or the old Lee's Summit No. 79. If all these blacks had left Lee's Summit and moved to the KCMSD and did so because there were no black schools in the district after 1910, the numbers are still too insignificant to have any substantial segregative effect on either the KCMSD or Lee's Summit.

Because of the state-mandated separate schools, the old Lee's Summit School District operated a black school until approximately 1910, at which time it was closed because there were so few black children. (Tr. 1199-1200, 1221). Despite the fact that there were no black schools after 1910 in Lee's Summit, black families moved to the district before 1954. (Tr. 1153-54, 1212-13, 1252-53, 1285-86, 1318, 1735, 2124). The old Lee's Summit No. 79 District transported its black students, from 1930-31 to 1940-41, to the Pleasant Hill School District. From 1941-42 until 1944-45, blacks were transported to the Young School in the Independence School District. From 1944-45 until 1950-51, old Lee's Summit (and, after 1949, Lee Summit R-7), transported black elementary students to Young and its black high school students to the KCMSD. From 1951-52 until 1953-54, all black students from the district were transported to the KCMSD. (P. Ex. 1800, 1801, 1802, 1863). The Court finds that old Lee's Summit and Lee's Summit R-7 transported black students to the KCMSD for only ten years. The total number of individual black students transferred was approximately 15, (Tr. 1256-58, 1742, and 5961, P. Ex. 1799, 1800, 1801, 1802, 1810, 1811,

1863, 3350), and the Lee's Summit District provided the transportation and tuition. (Tr. 1257, 1742, 1747, P. Ex. 3350, Campbell Depo. at 159-61, 166-67, and 172).

The Court finds the fact that the Lee's Summit School District and its predecessors did not maintain a black school from 1910 to 1954 and the fact that the Lee's Summit District transferred a *de minimis* number of black students to the KCMSD from 1945-46 to 1953-54, have not had and do not have any significant effect on the present racial composition of either the KCMSD or Lee's Summit School District.

In the 1954-55 school year, immediately after the *Brown* decision, the Lee's Summit District integrated its schools and all involuntary transfers of black students were stopped. One black student, at her request, was permitted to attend her final year of high school in the KCMSD during the 1954-55 school year. (Tr. 1267-68, 1274-76, Campbell Depo. at 174-75). After the 1954-55 school year, all students, regardless of race, meeting the racially neutral residency requirements of the school district, were permitted to attend school in the Lee's Summit R-7. The district discharged its affirmative duty and constitutional obligations under *Brown* by, among other actions, ceasing all black transfers and admitting all students to its schools on a racially neutral basis. The Court finds there are no vestiges of the prior legally mandated segregated school system in the district.

Total student enrollment in the district steadily increased to its peak of 7,001 students in 1979 and has gradually declined since. (P. Ex. 53G, 993, 2967). The number of black students enrolled in the district has increased regularly from 1 in 1968, to 87 blacks enrolled

in 1980. (P. Ex. 53G). Presently, black students are enrolled in every school in the Lee's Summit District. There is only a single high school in the district and all students attend it. (P. Ex. 2967).

Plaintiffs presented no evidence showing that the Lee's Summit District provides facilities, extracurricular activities, transportation, or any other student service on a racially discriminatory basis. Nor has there been any evidence of school site selection or closings with a discriminatory intent. Only students whose families reside in Lee's Summit R-7 or who own property in the district are permitted to attend school in the district. Those students whose parents only own property must pay tuition set off by the amount of tax paid on the property. (P. Ex. 3337, Campbell Depo. at 84-85, 107, 125-126). There is no evidence that this policy was racially motivated or applied in a discriminatory manner but is the result of sound administrative, educational, and financial concerns. There is no evidence that Lee's Summit has acted with an intent to discriminate or to affect the racial composition of the KCMSD or any other school district at any time since the *Brown* decision. Lee's Summit is presently operating a unitary school district.

Lee's Summit joined the Cooperating School Districts Association of Suburban Kansas City for purchasing power, and were not motivated by any racial animus. (Copeland Depo. at 81-84, Campbell Depo. at 64-65).

In regard to the 1/2% city tax, such a small part of the City of Kansas City is in Lee's Summit, that the district's sales tax proceeds were a "very very small portion" of the district's receipts. (Campbell Depo. at

59, Copeland Depo. at 100). The Court finds no discriminatory intent by Lee's Summit in regard to these tax receipts and the Court finds that the sales tax has had no significant segregative effect in any school district.

There have been over the years, isolated instances where special education or handicapped students were transferred to another district. Frequently, those children were sent to private schools. (P. Ex. 3495; Campbell Depo. at 38-40, 46-48, Ex. 114 thereto; Copeland Depo. at 42, 64-65). School district records for 1975 indicate 55 students attended school in another district with tuition being paid by Lee's Summit. They were all learning disability or special education and handicapped programs. (P. Ex. 1722). The Court finds that these transfers were not done with any discriminatory intent and have had no significant effect on the present racial composition of the Lee's Summit or any other defendant school district. Nor do these cooperative arrangements abrogate the district's autonomy.

The Lee's Summit R-7 district participates in the Herndon AVTS located in the Raytown School District. The Court finds no discriminatory intent or racial motivation in Lee's Summit's participation in the Herndon AVTS, which is substantially closer than the KCMSD AVTS. (P. Ex. 34). Plaintiffs presented no evidence that the KCMSD ever approached the Lee's Summit district about participating in an AVTS or ever invited Lee's Summit to participate in the KCMSD AVTS once it was established. The fact that Lee's Summit never participated in the KCMSD AVTS is not because of any racially discriminatory intent by the Lee's Summit District.

There is no evidence demonstrating any involvement by Lee's Summit School District in House Bill 171.

The Lee's Summit School Board took no position on the Spainhower recommendations. (Campbell Depo. at 140, Copeland Depo. at 99). Nor was race ever discussed by the Lee's Summit District in connection with the recommendations. (Copeland Depo. at 110-111).

Although there are no black faculty or staff presently employed full-time by the district, (P. Ex. 994, 2967), plaintiffs have failed to show by a preponderance this was due to racial discrimination rather than other factors such as wages or the district's location. The Court finds that affirmative steps have been taken by the Lee's Summit District yet blacks have failed to pursue, seek, or accept the employment opportunities made available to them. There have been good faith efforts by the Lee's Summit district to employ blacks. (P. Ex. 2967). In any event, as reiterated in the general order, this is not an employment discrimination case and there is no credible evidence that the hiring practices of the Lee's Summit district are the cause of the present racial composition of the KCMSD or Lee's Summit School Districts.

In regard to housing, the Court finds that the school district was not involved in any way and was in no way responsible for the development of housing or housing policies by various municipalities either entirely or partially within the Lee's Summit School District. (Campbell Depo. at 21). The only concern Lee's Summit had with housing was its impact on the number of students that would be attending its schools. (Campbell Depo. at 67). With the exception of a legitimate racially-neutral

concern about trailer parks, (because they are taxed as personalty, not realty), the Lee's Summit School District did not involve itself in zoning questions or concerns. (Campbell Depo. at 137-39, Copeland Depo. at 87-89, 92).

In regard to racially restrictive covenants, the Court notes there were very few such covenants in Lee's Summit. (P. Ex. 22). There is no evidence that the Lee's Summit School District had any complicity in the placement or enforcement of those covenants or that any person was prevented from moving to Lee's Summit because of such covenants. There is simply no evidence that the Lee's Summit School District did anything to either lure white families or to discourage blacks from moving into the district or engaged in any conduct with the intent or which had the effect of affecting the racial composition of the student enrollment in the Lee's Summit School District.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by the Lee's Summit School District and its Superintendent.

Liberty

The Liberty School District serves an area in Clay County, Missouri, centered in the community of Liberty, Missouri. The school district is not now nor has it ever been contiguous to the KCMSD. (P. Ex. 1, 1A, 9). There is no evidence that the formation of Liberty's boundaries or any annexation thereafter was accomplished with the purpose or effect of racial segregation. There is no evi-

dence that any annexation took place for other than sound educational and practical reasons.

Based on the testimony of various witnesses and exhibits admitted, the Court makes the following findings regarding the education of blacks in the Liberty School District before 1954. Pursuant to the State mandated separate schools, the Liberty School District operated, from at least 1907, the Garrison School for blacks. Garrison had grades one through eight until 1926 when it added ninth grade. (Tr. 479). In 1930, tenth grade was added, in 1933, eleventh and in 1953 all twelve grades were available. (Tr. 2504, 5358). Then, from 1953 to 1957-58, Garrison offered only elementary grades.

Blacks from Liberty and surrounding areas such as Excelsior Springs, Plattsburg, White Oak, Mecca and Shady Grove attended Garrison. (Tr. 3523-24). There was insufficient proof that either the quality of education offered or lack of certain grades at Garrison caused an out-migration of blacks from Liberty to the KCMSD.

In the years when high school was not available at Garrison, Liberty paid the transportation and tuition to send its black students to the KCMSD. That included 7 to 8 blacks who attended Lincoln for part of the 1945 or 1946 school year before Garrison hired another teacher. (Tr. 3522). Then during the 1953-54 school year about 20 blacks were transported to the KCMSD. (Tr. 1831). The records from the KCMSD indicate a total of 13 blacks had been transferred from Liberty to its district before 1954. (P. Ex. 1775). The totals, even when liberally calculated, show less than 30 blacks were transferred from Liberty to the KCMSD in the years prior to the *Brown* decision. The Court finds this total too

insignificant to have had a substantial segregative impact on either the KCMSD or Liberty.

The Liberty High School integrated in 1954. (Tr. 1858, 2799, P. Ex. 2259), while Garrison continued to operate as a segregated elementary school through the 1957-58 school year. (P. Ex. 2263). Thereafter, and continuing to the present, the Liberty School District has been completely integrated and unitary. (P. Ex. 2264). While the Board's failure to act immediately regarding Garrison is not commendable, the Court finds that its gradual desegregation plan, which integrated all its schools within four years of the *Brown* decision, fully complied with the constitutional requirements of *Brown II*. *See*, 349 U.S. at 299-301. Moreover, plaintiffs' expert, Dr. Gary Orfield, opined that the operation of Garrison as an elementary school for blacks until 1958 had a small effect, if any on the residential patterns of blacks in the metropolitan area. (Tr. 14,926).

The total student enrollment in Liberty gradually increased from 3,644 in 1968 to its peak of 4,014 students in 1974 and has been declining since. (P. Ex. 53G, 995). Black enrollment during the same period has declined slightly from 124 to 101 students, for a current total of 2.7% of the student enrollment. (P. Ex. 53G, 995). There is no evidence that students are assigned to schools on a racially discriminatory basis or that facilities, extracurricular activities, transportation, or other student services are provided in a discriminatory fashion.

Because a tiny portion of the City of Kansas City extends to the Liberty School District, it chose to participate in the 1/2% sales tax with the City. It received less money than any other defendant district. (P. Ex. 1999).

Regardless of the amount, there is no evidence that this cooperation with the City of Kansas City had any racially segregative effect on the KCMSD or Liberty School District. (*See* general findings *supra*).

In regard to special education, Liberty, like other SSDs, may transfer some specially needy students to other districts for educational opportunities. Again, there is no evidence that Liberty's cooperation in this regard affected the racial composition of any district or compromised Liberty's status as an autonomous entity.

Liberty participates in the AVTS located and run by the Excelsior Springs School District, which is not a party to this action. There is no evidence that the Liberty School District participates with the Excelsior Springs AVTS for the purpose or the result of segregating students on the basis of race. Excelsior Springs, like Liberty, is located north of the Missouri River and is not contiguous at any point with the KCMSD. (P. Ex. 37).

There is no evidence that the Liberty School District took any position with regard to any legislation or propositions of reorganization, specifically, H.B. 171 and the Spainhower recommendations. The Court finds that the failure of the Liberty School District to take a position on any of the reorganization matters had no effect on the racial composition of any school district. Nor has there been a showing that Liberty's participation or nonparticipation in any cooperative venture with any other school district was undertaken with the purpose or effect of segregating students in either its district or in the KCMSD.

In regard to faculty employment, the Court once again notes this is not an employment discrimination suit but

a school desegregation suit. And while Liberty has employed only up to 2 black faculty members in any given school year, (P. Ex. 996), plaintiffs have failed to show a correlation between minority faculty and the number of blacks enrolled in the district. (*See* general findings *supra*). There is no credible evidence that the Liberty School District has engaged in any discriminatory employment practices nor have any complaints to that effect been filed against the district. The Court finds that of those black teachers who taught in the prior dual school system at least one stayed to teach in the integrated system, Professor Gantt, and the others left for reasons which the plaintiffs have failed to show. (Tr. 1837-38, 2381-82, P. Ex. 2254, 2265).

There has been no evidence that the Liberty School District has involved itself in decisions relating to zoning or the type and placement of housing within its district. The school district opposed trailer courts, like other school districts, not on racial grounds but because they were assessed as personalty rather than realty. (Riggs Depo. at 39-40, Stockwell Depo. at 50). The district tried to keep abreast of housing developments, (Stockwell Depo. at 49-50), simply to provide for projected student population. (Riggs Depo. at 13, Lidikay Depo. at 132).

There were a few racially restrictive covenants identified within the Liberty School District (P. Ex. 22), but there has been no evidence that the Liberty School District either placed or enforced any of those covenants. Nor has it been shown that a single black family refrained from moving to Liberty because of a racially restrictive covenant. There is no evidence that the Liberty School District acted in any manner to attract whites or to discourage blacks from moving to the district.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will sustain the Rule 41(b) motion filed by the Liberty School District and its superintendent.

North Kansas City

The North Kansas City School District (NKC) has been in existence since approximately 1913. (Tr. 5960-61). At various times, pursuant to a vote of the people, other elementary school districts have annexed to NKC, (Doolin Depo. Vol. I at 22-23), because many of them did not have a high school within their district and had been sending students on a tuition basis to NKC. All of these districts were contiguous to NKC. (Doolin Depo. Vol. I at 20-21). There is no evidence that the annexation of these districts to NKC or any other annexation to NKC was related to race or had a discriminatory effect. In 1962, NKC passed a resolution advising surrounding districts without high schools that were sending their high school students to NKC on a tuition basis that NKC could not continue to accept such students due to overcrowding and financial considerations. (Doolin Depo. Vol. I at 44). Race played no part in this policy. There is no evidence that NKC established, decreased, enlarged or maintained its boundaries for any reason related to race.

In regard to the education of black students prior to 1954, the Court makes the following findings based, unless otherwise specified, on the testimony of Ms. Pratt Davis, Ms. Feeler and Mr. Waller. (*See* Tr., Oct. 31 and Nov. 1, 1983). From 1900 to 1954, there were some black families residing within the present boundaries of the

NKC school district. The largest community of blacks was in the White Oak area, from 1915 to the 1940's. Because Missouri mandated separate schools, the black children attended the White Oak Elementary School, supported by the rural black community. Between 15 to 17 students were enrolled in that school. (P. Ex. 2397). The White Oak school operated intermittently until 1944. (P. Ex. 39). Those students wishing to go to high school traveled either to Garrison in Liberty or to R. T. Coles and Lincoln in the KCMSD with NKC paying their tuition and transportation. According to plaintiffs' expert, Dr. Anderson, about 10 to 15 students transferred to the KCMSD from the NKC area between 1900 and 1954. (Tr. 5960-61).

The total number of transfers from NKC to the KCMSD prior to 1954 did not have a substantial current effect on the racial composition of either district. Even if the Court concludes, which it does not, that the blacks living in NKC before 1954 moved to the KCMSD for schools, the numbers are too insignificant to have other than a *de minimis* effect on any defendant school district.

The Court finds that immediately after the *Brown* decision, the 1954-55 school year, the remaining black children in the district, the Pratts, were given the option of attending NKC schools or attending one more year in the KCMSD. (P. Ex. 2942, Schooling Depo. at 26-27). Because of various school activities in which the children were engaged, Mrs. Pratt elected to have her children continue in the KCMSD. One of her children, Ms. Shirlene Pratt Davis, testified at trial that no such option was provided. (Tr. 162-63). The Court does not find her testimony credible because she was only sixteen years old at the time and may have been at work during Dr. Schooling's visit with her mother. (Tr. 101, 204).

Even if the Court accepted Ms. Pratt Davis' version as true, the interdistrict transfer of the Pratt children is too insignificant to have had any effect, much less a substantial current effect, upon any school district.

The Court finds that NKC discharged its affirmative duty and constitutional obligations under *Brown* by, among other things, ceasing all black transfers and admitting all students to its schools without regard to race by 1955. There are no remaining vestiges of the prior dual school system in the district.

Presently, students are assigned to schools within NKC on a racially neutral basis. Attendance zones within NKC have been drawn without regard to race and without any intent to discriminate. (P. Ex. 997A, Waier Depo. at 74 and 241). There is no evidence of race discrimination on the basis of providing facilities, extracurricular activities, transportation or any other student service.

The school district's total enrollment steadily increased from 1953 to its peak in 1970 and has gradually declined since. (P. Ex. 2967). Black student enrollment has grown from zero in 1968 to 174 in 1984. (P. Ex. 53G, 997, 997A, and 2967).

While there was testimony of race discrimination against one black child in the Briarcliff Elementary School in 1974, it was a matter of intradistrict concern and has had no interdistrict effect. (Tr. 227).

A few witnesses testified that the North Kansas City area once had a reputation of being inhospitable to blacks. The Court finds that there is no evidence that NKC school officials or *any* school district caused or contributed to cause this alleged reputation. Nor does the Court find it relevant or significant as a possible interdistrict effect.

Because a portion of Kansas City extends into NKC, it agreed to share in the 1/2% sales tax. (P. Ex. 1999). Again, no evidence exists tending to show this cooperation with the City of Kansas City had a racially discriminatory purpose or effect.

Over the years, a few handicapped children or other special educationally needy students have been transferred to specialized schools in other districts. There is no evidence that NKC discriminated in this area or that these determinations were made in a manner that was not racially neutral.

NKC has never participated in a cooperative vocational education project with another school district. (Doolin Depo. Vol. I at 47). The decision to provide vocational education in the NKC schools and not to participate in any cooperative vocational education program is not related to race. Further, there is no evidence that the KCMSD ever contacted NKC to propose any sort of cooperative vocational educational program involving those two districts. (Waier Depo. at 130).

NKC supported passage of House Bill 171, not for racially discriminatory reasons but for tax and local control reasons. (P. Ex. 430, Doolin Depo. Vol. II at 118-120).

In regard to faculty employment, there is no evidence that faculty or other school staff are assigned within NKC on a discriminatory basis. NKC has followed the practice of hiring the best person available for an open position. (Waier Depo. at 140-43, Atkin Depo. at 34 and P. Ex. 2967). The number of black teachers in NKC has increased from one in 1972-73 to fifteen in 1980. (P. Ex. 998 and 2967).

Plaintiffs' employment discrimination evidence against NKC is premised primarily upon the analyses and opinions of their statistician, Dr. Carlson. The Court finds Dr. Carlson's opinions in regard to NKC unpersuasive. Dr. Carlson calculated that NKC had only hired three black teachers between 1973 and 1980 when the correct number was 14 to 15 black teachers hired. (P. Ex. 998 and 2967). The correct number is within two standard deviation points of Dr. Carlson's predicted number of hirees. (P. Ex. 721F, Table G). Furthermore, as described more fully in the general findings *supra*, there is no credible evidence of any correlation between the racial composition of a school district's faculty and staff to the racial composition of its student body. Plaintiffs' own evidence refutes their theory: the black enrollment in the Hickman School District has grown rapidly from 29 (.20%) in 1968 to 1,497 (16.70%) in 1982. (P. Ex. 53G). This increase took place while Hickman Mills, according to Dr. Carlson's data, hired eight black teachers from 1970 to 1983. (P. Ex. 721F, Table G). That number is less than that hired by NKC. The numbers simply do not reflect a correlation between the racial composition of the staff and the student body.

In regard to housing, there has been no evidence that NKC acted to lure or encourage white families to move into NKC or to discourage black families from moving there. In fact, it has been NKC's policy not to attempt to influence the type of housing that was built or not built in the district. (Doolin Depo. Vol. I at 119, Ewing Depo. at 27, 106, and Waier Depo. at 77, 79-80). The Court finds there is no credible evidence of housing discrimination in NKC that has had a substantial interdistrict segregative effect. Dr. Tobin's map showing restrictive covenants cited very few such covenants in NKC. (P. Ex. 22). In fact, much of the NKC development occurred after the Supreme Court mooted the effect of these covenants in 1948. *See, Shelley v. Kraemer*, 334 U.S. 1 (1948). In any event, there is no evidence that the NKC School District participated in the placement, encouraged the enforcement of these covenants or that any blacks failed to move to the district because of the covenants.

The NKC district is interested in housing only to the extent of planning construction of schools and accommodating the students generated by the new housing. (Doolin Depo. Vol. I at 30, 33, 124, and Ewing Depo. at 23). These actions by NKC were in no way related to race but were simply to plan to meet the educational needs of the district's students. In a few instances, NKC contacted zoning officials about zoning matters when it was necessary to arrange for rezoning or the like to accommodate the purchase or sale of property which the school district owned or wished to acquire. (Doolin Depo. Vol. I at 33). These contacts were not race related and did not impact upon the race of students attending KCMSD schools.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by NKC and its Superintendent.

Park Hill

Park Hill Reorganized School District No. 5 (Park Hill) is located wholly within Platte County, Missouri, (Harmon Depo. at 31), and is not contiguous to the

KCMSD. (P. Ex. 22A). The school districts in Platte County were consolidated and reorganized between 1949 and 1951 with the Park Hill District coming into existence as a result of a consolidation of five school districts with the old Parkhill School District in 1950, followed by a reorganization of six additional districts with the Consolidated District in 1951. All took place pursuant to a popular vote of the residents of the affected areas. (Aikmus Depo. at 22-23 and Ex. 3 and 4 thereto). The area encompassed by the Parkhill School District was rural and agricultural prior to 1947. (Tr. 1499, 2718, 3169, 3182, 3138, 13,022-23, P. Ex. 22 and 22A). The Court finds that the establishment of the Park Hill boundaries in 1951 were not racially motivated and have not had any segregative effect in either the Park Hill district or any other school district and there have been no significant boundary changes since that time. (Jones Depo. at 56-57, 74-75, Harmon Depo. at 32-34 and Shipley Depo. at 27, 68-70).

Historically, there was a black community in the area that became the Park Hill District, centered in the town of Parkville. (*See, e.g.*, P. Ex. 2, 8B, 37, 37A, 51A and 51B). In 1900, there were approximately 250 blacks in the two townships, Pettis and Waldron, that subsequently became what is the Park Hill School District. (May Township as constituted in 1900 was also part of what became the Park Hill District, but had few blacks. *See* P. Ex. 51A). By 1910 the black population of Pettis and Waldron Townships had decreased by 66 persons, and the white population had decreased by over 400. (P. Ex. 51A). Since Waldron was the more agricultural area (Tr. 2718-19, 3138 and 3182), it is reasonable to infer that the decline in population between 1900 and

1910 was associated with the decline in the availability of agricultural employment and supports the conclusion that the decline in black population in this area was the result of economic changes in agriculture rather than the availability of schools. Between 1910 and 1960, the black population in the area covered by Pettis and Waldron Townships decreased by fewer than 50. (P. Ex. 51A). The black population of Pettis Township mostly concentrated in Parkville, where jobs were available. (Tr. 329-330, 1466, 2720, 3169 and 3221). The Court finds from the weight of the credible evidence that economic conditions and employment opportunities, rather than schools, were the significant factors affecting choice of residence by those blacks leaving and those blacks remaining in the Park Hill area between 1910 and 1960.

Even if schools were a significant factor in the out-migration of blacks from the Park Hill area subsequent to 1910, the Court finds that the numbers of persons out-migrating from the Park Hill area to be so minimal that it could not have had any effect on the racial composition of Park Hill schools or schools in any other district including the KCMSD.

As of the 1940's, there were 15 to 20 black families residing in Parkville and several more families to the west of town. (Whipple Depo. at 21-22, Jones Depo. at 10-11 and Tr. 3165-69, 3242). Only one black family did not reside in the immediate Parkville area, the Pearl family, (Jones Depo. at 35), but resided on a farm located in what became part of the Platte City district. (Tr. 3143 and 3158).

Since at least 1903, the old Parkville district (and Park Hill after 1951) continuously operated a black ele-

mentary school, Banneker, in Parkville. (Tr. 2828, P. Ex. 77A, and Jones Depo. at 48). From at least 1924 on there were between 25 and 30 students in that school. (Tr. 2828, 3181 and Jones Depo. at 48). According to various witnesses (Curtis, Hoskins, Jackson and Douglass), Banneker accepted blacks from surrounding black communities, used old books and supplies from Grayden Elementary (white school) and those purchased by the teachers from personal funds. Banneker operated as a segregated black elementary school until it was closed in 1959. (P. Ex. 39, 2278). There was insufficient proof that either the quality of education offered or lack of certain grades at Banneker caused an out-migration of blacks from Park Hill to the KCMSD. The Court finds that the operation of Banneker school could not and did not have a significant segregative effect upon the Park Hill District, the KCMSD or any other district.

Although there was no high school for blacks in what now constitutes the Park Hill School District, there is no evidence that black high school students from the area attended the KCMSD schools prior to 1940. (P. Ex. 1775). The evidence is that some black Parkville students attended Sumner High School in Kansas City, Kansas and others attended Kansas Vocational School (KVS) and still others attended church-related schools in both Kansas City, Missouri and Kansas City, Kansas. (Tr. 3170, 3187, 3189, 3226-27).

Between 1940 and 1956, black high school students from Parkville (up to 1951) and the Park Hill (after reorganization in 1951) districts attended the KCMSD schools. Tuition and transportation were paid by the Parkville and, subsequently, the Park Hill School District. (Tr. 1477-78, 3228-29, Jones Depo. at 27-28). No more

than 7 students were transported in any year, and somewhere between 11 and 16, total, were actually transferred to the KCMSD schools from Parkville. (Tr. 2839, P. Ex. 1775, 1831, 2271A). The transfer of so few students to the KCMSD did not have any significant effect upon the racial composition of the Park Hill District, the KCMSD or any other district nor was it a cause of depopulation within the Parkville and Park Hill District or impaction of blacks within the KCMSD.

On August 9, 1954, the Park Hill Board of Education decided to postpone desegregation of the high school for one year until the final decision of the Supreme Court in *Brown*. (P. Ex. 2270, Fickle Depo. at 33-34). In August, 1955, the Board again took up desegregation of the high school (at that time there were 42 blacks enumerated, 13 of high school age, (P. Ex. 2269), and voted to furnish tuition and transportation to the KCMSD for the 7 who enrolled for the 1955-56 school year. (P. Ex. 2271A). While the Board's failure to act immediately on the *Brown* decision is not commendable, the minutes reflect some genuine concerns about the students and their preferences and do not reflect any overt refusal to abide by the decision of the Supreme Court or any racial animus. (P. Ex. 2271). Park Hill High School was integrated in the 1956-57 school year, the junior high was integrated in the 1957-58 school year and the elementary schools were integrated in the 1959-60 school year. (Tr. 2740, 2831, 2848, 2857 and Jones Depo. at 35-36, 103). Even though the Park Hill district did not completely integrate until five years after *Brown I*, the Court finds its gradual desegregation was within a constitutionally acceptable time span under *Brown II*. 349 U.S. at 299-301. In any event, there was no segregative impact upon any other defendant district.

Since 1959 the Park Hill District has operated a unitary, fully integrated school district. (Tr. 1507). Black students attend each of Park Hill's schools (P. Ex. 999), and all students, regardless of race, attend neighborhood schools. (Tr. 1507, 1509).

There is no evidence that any person moved into or out of the Park Hill School District to the KCMSD or elsewhere because of the continued operation of segregated schools between 1954 and 1959. Additionally, Dr. Orfield, plaintiffs' expert, testified that the continued operation of segregated schools in Park Hill and other districts beyond 1954 had at most, a small effect on residential patterns. (Tr. 14,926). In view of the foregoing, the Court must conclude that the continued operation of segregated schools until 1959 had no significant segregative effect on either the Park Hill School District or any other school district including the KCMSD and was not a cause of depopulation or impaction. The Court further concludes that the vestiges of the prior dual school system have been fully eliminated.

The number of black students in Park Hill schools has increased since 1976 a total of 110 students, while at the same time, the overall student population has fallen by 600 students. (P. Ex. 20A, 2967). The continued increase in black enrollment in the Park Hill District suggests that there are no remaining effects of the prior dual school system in that district.

Because a portion of the Park Hill School District is within the municipal boundaries of the City of Kansas City, Park Hill supported and shared in the proceeds of the city's 1/2% sales tax. (P. Ex. 1748). As with other school district defendants, there is no indication

that Park Hill's agreement to share in this tax was in any way racially motivated or had any racial impact.

The Park Hill District participates in the Platte City AVTS, a district not a party to this litigation. Both Park Hill and Platte City are contiguous districts north of the Missouri River, neither of which border the KCMSD. (P. Ex. 34). There is no showing that Park Hill's participation in this AVTS and not in KCMSD's AVTS is for other than obvious reasons of closeness and administrative convenience.

There is no evidence that Park Hill took any position with respect to House Bill 171 or with respect to the annexation of parts of the Park Hill School District by the City of Kansas City.

The Park Hill School District adopted a resolution on February 10, 1969 (P. Ex. 1728) indicating that it was opposed to the Spainhower recommendations because of the Board's concerns with finances, local control and representative government. (Harmon Depo. at 133-137). Such opposition was not motivated by racial animus and has not been shown to have had any significant effect on the passage or failure of any legislation.

While the records indicate Park Hill has hired few black faculty or staff, (P. Ex. 1000, 2967), plaintiffs have not established the number of blacks who applied for employment with the district. Nor is there any evidence that any black applicant for employment has ever been turned down by the Park Hill School District. There is no evidence that any person was not hired or was terminated by the Park Hill School District by reason of race. The evidence is that the school district's hiring practices are racially neutral and designed to affirm equal

employment opportunity. (P. Ex. 2967, Jones Depo. at 93, Howard Depo. at 67-69, 113 and Shipley Depo. at 55-57). Again, absent a nexus between faculty racial composition and student body racial composition, this evidence has no bearing on liability in an interdistrict case. (*See* general findings *supra*).

The Park Hill School District generally avoided all involvement in housing matters within its borders. (Jones Depo. at 45-46, Harmon Depo. at 49-52 and Shipley Depo. at 32-33). The district never opposed or took a position against apartments, trailer courts or subsidized housing and all are present within the district. (Harmon Depo. at 49-52, 120-121 and Shipley Depo. at 32-33, 80). The district never took an active role in zoning matters, other than one incident involving a commercial development adjacent to one of its schools where service of alcohol was involved in addition to a boundary dispute. (Jones Depo. at 45-46, Harmon Depo. at 4952, 120-121, Shipley Depo. at 32-33 and Howard Depo. at 31-35). Traditionally, the district's only involvement in development within its boundaries was an attempt to purchase school sites in areas where development was likely to occur. (Jones Depo. at 45-46, Harmon Depo. at 41-44, 115-116, 162 and Howard Depo. at 23). The Court finds no evidence that the Park Hill District was involved in making or carrying out housing policies. Further, the actions of the school district had no effect on the racial residential patterns within the Park Hill District and no interdistrict effect on racial residential patterns.

The Court finds there were 33 restrictive covenants identified in Platte County, most of them put in place between 1940 and 1950. (P. Ex. 22, 1239A). Before the *Shelley v. Kraemer* decision, 334 U.S. 1, the entire population in the county only increased by approximately 1,000 people. (P. Ex. 16A). Obviously, these covenants did not create a "white haven" in the county. The Court finds that the existence of the restrictive covenants had no effect on racial residential patterns within the Park Hill School District. Furthermore, there is no evidence that the school district had any complicity in the placement or enforcement of those covenants.

The Court finds that the Park Hill School District has neither lured white families or discouraged black families from moving to the district. Plaintiffs' witnesses could only place three families from the KCMSD in the Park Hill School District.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by Park Hill and its Superintendent.

Raytown

Consolidated School District No. 2 (Raytown) resulted, by popular vote of the people, from the consolidation of several rural school districts in 1903. (Herndon Depo. at 32-33). There have been no annexations or boundary changes since its formation, (Herndon Depo. at 34), and no evidence of a racially discriminatory intent or effect therefrom. Raytown is contiguous to the KCMSD on the east, southeast. (P. Ex. 37).

The Raytown Board of Education passed a resolution on July 7, 1975, that opposed any measure that would change, divide or enlarge its existing boundaries. (P. Ex. 2194). Although the KCMSD is mentioned in the resolu-

tion, the Court finds this was a vote affirming local control; there is no evidence of discriminatory purpose or impact. Moreover, the resolution was a nullity because the people in the district, by petition and vote, could change their boundaries notwithstanding the Board's position.

Prior to 1954, there were no black enclaves or communities within the boundaries of the Raytown School District (P. Ex. 37A, Lowell Depo. at 8-9, 14). No black students, therefore, were transported out of the Raytown District to the KCMSD or any other district, (Lowell Depo. at 9), nor was there a need for separate schools as mandated by the state. Plaintiffs have failed to show that the absence of a separate school for blacks within the Raytown School District prior to 1954 precluded any blacks from settling there.

The Raytown School District experienced a steady growth in total enrollment from 1953-54 to 1969-70, when it peaked at 16,058; enrollment has gradually declined since. (P. Ex. 2967, Herndon Depo. at 44). No black students resided within or were enrolled in the Raytown School District during the 1953-54 or the 1954-55 school years. (Lowell Depo. at 13-14). Because the district did not maintain records of the race of the students during the 1960's, (P. Ex. 2967), the Court cannot ascertain when blacks were first enrolled. The number of blacks has increased in the past decade from 13 enrolled in 1970 to 673 enrolled, 7.6% of the student body, in 1982. (P. Ex. 53G, Ex. 1001).

Because a portion of the Raytown School District is within the municipal boundaries of the City of Kansas City, (Lowell Depo. 8-9), Raytown supported and shared

in the proceeds from the City's 1/2% sales tax. (P. Ex. 1999). As with other school district defendants, there is no indication that Raytown's agreement to share in this tax was in any way racially motivated.

There are some students residing within the Raytown School District that have attended school in other districts because of handicap or for special education. (Atkin Depo. at 93-95, 97-98). Plaintiffs have not shown that such attendance for special education was influenced by or based on racial considerations. These transfers had no effect, in any event, upon the racial composition of Raytown or any other defendant district. Nor did the cooperative arrangements diminish the district's autonomy.

The district provides its students with vocational education at its Joe Herndon Area Vocational-Technical School which was built after state approval in the early 1970's and opened in the 1973-74 school year. (P. Ex. 1537, Sheets Depo. at 16, 17-19). The decision to build an AVTS in the Raytown School District followed the expression of interest in participating in such a school by the Center, Grandview, Hickman Mills, Independence, and Lee's Summit School Districts. (P. Ex. 3271, Herndon Depo. at 124-128). There is no evidence that the creation of the Herndon AVTS nor the districts that sought to join therein were motivated in any way by a discriminatory purpose. The Herndon AVTS has operated at 80% to 90% of capacity throughout most years of its operation. (Sheets Depo. at 39). It has never received any requests from a student or from any district for exchange of students between the Herndon AVTS and any other AVTS. (Sheets Depo. at 54).

In 1980, the Office for Civil Rights conducted an on-sight review and investigation of the Herndon AVTS and

concluded the vocational-technical programs were being provided in compliance with the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964, (P. Ex. 453). There is no showing that the racial composition of the student enrollment at the Herndon AVTS has had any effect upon the racial composition of any defendant school district.

In regard to H.B. 171, the Raytown Board of Education voted in 1956 to request an opinion from the Attorney General whether any part of its district would be absorbed into the KCMSD if the City's population exceeded 500,000. (P. Ex. 2191). No evidence exists, however, relating this request to other than racially neutral concerns over local control and administration.

The Raytown School District opposed the Spainhower recommendations not because of any racial animus, but because it was not administratively feasible. (Herndon Depo. at 71-72).

While the records indicate Raytown has hired few black faculty, (P. Ex. 1002), plaintiffs have not established the number of blacks who actually applied for employment with the district. Instead, they rely upon the statistical analysis of Dr. Carlson who computed faculty availability for the entire SMSA. (P. Ex. 721). (*See*, general findings *supra*). Plaintiffs have not established with credible evidence that there was any racial discrimination in the district's employment decisions. (P. Ex. 2967).

In regard to housing, the Court finds there is no credible evidence that the Raytown School District took any action or position which prevented any black family from moving to that district. (Herndon Depo. at 22, 41, Atkin Depo. at 141). Nor is there any credible evidence that

Raytown took any action or position which enticed or lured any white family from the KCMSD to Raytown. The map prepared by Dr. Tobin, (P. Ex. 22), shows that there were racially restrictive covenants in the Raytown School District, but there is no evidence which tends to prove that the district had any complicity in the placement or enforcement of those covenants nor is there any evidence that any black family failed to move to Raytown because of those covenants. The continued increase in the number of blacks enrolled in Raytown (P. Ex. 53G, and Ex. 1001), is convincing evidence that there is no barrier to blacks moving to the Raytown School District nor is there any present effect of any past practices which may have had a discouraging effect on black moves.

While there was some evidence that the Raytown area has a reputation of being inhospitable to blacks, (*see, e.g.*, Cleaver's testimony), plaintiffs adduced absolutely no evidence that the school district or its officials caused or contributed to cause that reputation.

The only position which the Raytown district took with respect to any housing or zoning matters was its opposition to trailer courts because of their taxation as personalty rather than realty. (Herndon Depo. at 40-41). There is simply no evidence that the Raytown School District engaged in any conduct relating to housing matters which had the intent or effect of affecting the racial composition of the student enrollment in the Raytown District or in any other defendant school district.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact on any other district, the Court will grant the Rule 41(b) motion filed by the Raytown School District and its Superintendent.

CONCLUSIONS OF LAW

For ease of discussion and understanding, various legal standards have been included in the pertinent fact-finding sections of this order *supra*. They are hereby incorporated as conclusions of law. In some instances, only brief remention of certain cases may be made.

As indicated earlier, the touchstone of an interdistrict school desegregation case is *Milliken v. Bradley*, 418 U.S. 717 (1974). *Milliken* teaches that before district boundaries may be ignored or school districts consolidated for remedial purposes, there must be evidence of a constitutional violation in one district that produces a significant segregative effect in another district. The racially discriminatory acts must be a substantial cause of interdistrict segregation. 418 U.S. at 744-45. The absence of an interdistrict violation and interdistrict effect requires interdistrict relief to be denied. *Id.*

The theories offered here have been considered—and rejected—by the Supreme Court in *Milliken*. For example, upon finding violations within the predominantly black city district but not in the surrounding predominantly white suburban districts, the Court declared, "Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts." 418 U.S. at 749. After assessing the evidence, the Supreme Court held, "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system." *Id.* at 746. To award the relief plaintiffs seek here would be contrary to the

express mandate from the High Court because it "would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court." *Id.*

The cause and effect nexus cannot be overemphasized. As the Fifth Circuit recognized, "[t]he court's deliberate choice [in *Milliken*] of phrases such as 'substantial' or 'direct cause' and 'significant segregative effect' expresses an insistence that in cases where an interdistrict remedy is requested, there must be clear proof of cause and effect and a careful delineation of the extent of the effect." *Lee v. Lee County, supra*, 639 F.2d at 1256. Not only is plaintiffs' evidence here blurred as to cause and effect, there is no "careful delineation of the extent of the effect."

Another recent Fifth Circuit decision elaborated on the Supreme Court's requirement of an "interdistrict violation": "The requisite segregative intent must be not simply to discriminate within the offending system but further a clear intent to cause segregative effects within the neighboring district." *Taylor v. Ouachita Parish School Board*, 647 F.2d 959, 969 (5th Cir. 1981). As clearly evident by the findings of fact made herein, plaintiffs have failed to prove that conduct by *any* SSD met this standard.

Furthermore, the Court has rejected plaintiffs' "effects" argument which would have held the SSDs liable and incorporated them in an interdistrict remedy on the basis of alleged wrongs committed by other actors, e.g., the state. The *Taylor* court also rejected the "effects" argument reasoning if:

> [i]nterdistrict effect alone transform otherwise intradistrict unconstitutional actions into an interdistrict violation, then the *Milliken* insistence that 'without out an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy' contains a redundancy: the only interdistrict thing about the violation would be its effect.

648 F.2d at 969.

As articulated in *Columbus Board of Education v. Penick*, to make out a fourteenth amendment equal protection claim, plaintiff *must* show a discriminatory purpose, not just disparate impact and foreseeable consequences. 443 U.S. 449 (1979). Plaintiffs' evidence simply does not make the intentional cause and effect connection.

This Court is compelled to follow the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation. *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979) (Dayton II), *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The Court in *Dayton* specifically criticized the lower court for aggregating a series of violations to add up to a significant "cumulative" violation—a procedure plaintiffs would have us adopt here. The Court notes *Dayton* was not an interdistrict case; however, the message gleaned is to correct only the violations found, and nothing more expansive is justified or permissible. Therefore, the constitutional violation must be substantial. Neither cumulative nor *de minimis* violations will justify interdistrict relief. 433 U.S. 406, 413 (Dayton I). At

most, plaintiffs' evidence is only *de minimis* and is therefore legally insufficient to justify the relief sought against the suburban school district defendants.

A review of the legal standards applicable to various issues raised by plaintiffs confirms the Court's conclusion.

Pre-1954

The parties stipulated to the existence of the state mandated dual school system and the Court took judicial notice of the fact that private discrimination and segregation were prevalent in years past. Nonetheless, plaintiffs presented months of testimony regarding discriminatory conditions existing from the turn of the century to the *Brown* decision in 1954. For the Court today to find a constitutional violation based on that evidence, however, plaintiffs needed to prove by a preponderance that the SSDs were the original segregative actors and that vestiges of those past acts remain. It is in this latter respect that plaintiffs' proof floundered. Regarding physical segregation in schools during the early decades of this century, the Supreme Court stated "[b]oth by reason of the substantial time that [had] elapsed and because these practices have ceased, . . . the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy." *Dayton I, supra*, 433 U.S. at 411. The Court has found no continuing segregative policy by these defendants.

Another factor negating the importance of plaintiffs' voluminous pre-1954 evidence is simply its age. Our society is dynamic; myriad factors produce a multitude of simultaneous decisions and consequent effects. If it were a stagnant entity, the pernicious effects of de jure segregation would be obvious. Due to its fluid nature,

however, acts now 30 years past have negligible present effects. Such is the fate of the discriminatory practices plaintiffs took months to develop. Too many events have intervened, reshaping earlier actions. *Lee v. Lee County*, *supra*, 639 F.2d at 1259.

The Brown Duty

Plaintiffs' evidence also supports the Court's conclusion that all SSDs have met their constitutional obligation to operate a unitary school system. That obligation was initially articulated in *Brown II* 349 U.S. at 300: "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." Defendants are required to "make a prompt and reasonable *start* toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner." *Id.* (emphasis added). As the findings in the individual district sections show, each suburban district, within a maximum of four years of *Brown*, was sending its students to school without regard to race. Most districts were doing so within one year of the *Brown* decision. (See individual findings *supra*). Prior to *Brown* and pursuant to state statute, the local school districts had been operating a dual school system. Certainly such prompt action dismantling the dual system following *Brown* was accomplished "with all deliberate speed." 349 U.S. at 301. The duty of each SSD was to dismantle its dual school system; not the dual system in some other district.

And once a racially neutral school system had been established, racial imbalance resulting from other than purposely segregative acts is beyond the authority of the

Court to correct. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *See also Ross v. Houston Independent School District*, 699 F.2d 218, 225 (5th Cir. 1983) ("[s]chool officials who have taken effective action have no affirmative 14th amendment duty to respond to the private actions of those who vote with their feet.") The constitution does not compel school officials to correct conditions over which they have no control, like residential choices. *Berry v. School District*, 442 F.Supp. 1280, 1326 (W.D. Mich. 1977), *aff'd* 698 F.2d 813 (6th Cir.), *cert. denied* 104 S.Ct. 235 (1983). The Court well remembers the observation of the Supreme Court that there is just so much baggage that a school case can carry. *Swann, supra*, 402 U.S. at 22-23. Moreover, evidence of housing discrimination was presented in the *Milliken* case and discussed in the concurring and dissenting opinions (418 U.S. at 753, 757, 762 & 781) yet the majority opinion was based on findings regarding conduct by school officials, not housing actors.

Housing

Plaintiffs, however, relying on certain language in Justice Stewart's concurring opinion in *Milliken*, seek to encompass the SSDs in an interdistrict remedy because of an alleged nexus between housing discrimination and school segregation. Justice Stewart indicated an interdistrict remedy might be imposed "[w]ere it to be shown, for example, that state officials had contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws. . . ." 418 U.S. at 755. He also stated, however, that the existence of a predominantly black school population in the city "core" cannot be changed by federal courts "unless and

until it is shown that the State or its political subdivisions, have contributed to cause the situation to exist." 418 U.S. at 756 n.2. Therefore, even applying the standards suggested by Justice Stewart, plaintiffs either had to prove intentional segregative acts by each school board sought to be included or that the SSDs were mere agents of the state causing alleged constitutional violations by the state to vicariously inure to the SSDs.

Plaintiffs proved (if such proof was necessary) that there is a nexus between housing patterns and school composition. The two are inextricably intertwined:

> People gravitate toward school facilities, just as schools are located in response to the needs of the people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

Swann, 402 U.S. at 20-21. However, proof of the connection alone is insufficient to find liability. And plaintiffs' evidence of segregative *acts by the SSDs* was anemic.

As already discussed, within a few years of *Brown*, each SSD was operating a unitary school system. The post-*Brown* actions purportedly evidencing "vestiges" of segregative intent, (for example support or opposition to legislative proposals, zoning changes, trailer parks, apartments and annexations) hardly support an inference of a constitutional violation by the SSDs much less an explicit finding of a *substantial* constitutional violation.

As discussed earlier, to find the SSDs vicariously liable for acts of the state, the Court must make the threshold determination that the SSDs are mere agents

or arms of the state and not independent, locally autonomous entities. After applying the test for autonomy as directed by *Milliken*, the Court already concluded the SSDs are independent and their boundaries must be respected.

Whether plaintiffs' evidence was sufficient to sustain a finding of liability against other actors in the housing market is irrelevant to the instant motions to dismiss filed by each SSD defendant. The nexus necessary must be between the conduct of the defendant school districts and actions of those responsible for shaping residential patterns. The absence of such a connection forbids a finding of liability against the SSDs to remedy any racial imbalance that may be attributed to those housing market actors. *Bell v. Board of Education*, 683 F.2d 963 (6th Cir. 1982).

Faculty

The Court has already found that the faculty and staff composition of the SSDs does not affect the racial composition of the student bodies therein. The Court noted that any intradistrict or purported employment violations have no relevance unless shown to have an interdistrict effect. Furthermore, the evidence did not even support a finding of intradistrict discriminatory hiring or promotion policies by the SSDs. The duty, which each SSD has fulfilled, is to make a sustained good faith effort to recruit minority faculty members. *Oliver, supra*, 706 F.2d at 762.

The Court refuses to apply an intradistrict factor, faculty imbalance, (*see e.g. Swann, supra*, 402 U.S. at 18-20), and conclude therefrom that an interdistrict vio-

lation exists. There is simply no law to support plaintiffs' proposition.

Furthermore, as evidenced by the SSDs' answers to interrogatories, the districts have been hiring on a racially neutral basis for many years thus weakening any effect the past dual school system may have had. *Dayton I, supra,* 433 U.S. at 411.

Findings by Other Courts

The findings made herein are wholly consistent with the law as applied in this Circuit. Probably the most distinguishing feature between this and the *Liddell* litigation is the fact that no trial, resulting in a finding of liability against the suburban districts, was ever held. A plan was devised to remedy school segregation existing within the city schools in which the state was to fund a portion. Regarding the suburban districts, however, the plan could only provide incentives for their *voluntary* cooperation:

> [T]he district court can require existing defendants —the state and city school board—to take the actions which will help eradicate the remaining vestiges of the government-imposed school segregation in the city schools, including actions which may involve the *voluntary* participation of the suburban schools. For example, the district court could
>
> • • • •
>
> (4) require the state to provide additional incentives for *voluntary* interdistrict transfer.

Liddell v. Board of Education, 677 F.2d 626, 641-42 (8th Cir.) (Liddell V) *cert. denied,* 103 S.Ct. 172 (1982) (emphasis added). As the Eighth Circuit commented,

> Many of these ideas and techniques require cooperation by the suburban schools, others do not. To the extent that suburban schools are *willing to cooperate,* the plans requiring their participation can now go forward. To the extent they are unwilling to do so, the 12(c) plans must be tailored to be effective without their mandated participation. We emphasize that suburban schools that *voluntarily* participate will not by such participation admit liability or waive any right that they may presently have to be excluded from a plan of mandatory interdistrict desegregation.

Id. at 642 (emphasis added). The ruling is abundantly clear that absent a finding of liability on the part of each SSD, they cannot be compelled to participate in an interdistrict plan; only by their voluntary cooperation could interdistrict transfers be considered. The *Liddell* court did conclude that because the state was the primary constitutional violator, mandating that it fund voluntary interdistrict transfers was settled as the "law of the case." *Liddell v. Board of Education,* No. 83-1957 slip op. at 28 (8th Cir. Feb. 3, 1984) (Liddell VII). Such is not the issue nor posture of the case here.

Comparison of this increasingly familiar record with other cases in which an interdistrict remedy was found appropriate confirms the Court's decision that the requested relief must be denied. The Court in *Berry v. School District,* 698 F.2d 813 (6th Cir.) *cert. denied* 104 S.Ct. 235 (1983), *Evans v. Buchanan,* 393 F.Supp. 428 (D. Del. 1975), *aff'd mem.,* 423 U.S. 963 (1975), and *Newburg Area Council v. Board of Education,* 510 F.2d 1358 (6th Cir. 1974) *cert. denied,* 421 U.S. 931 (1975) all found the local districts were not autonomous (unlike

in Missouri). Here, the SSDs do not ignore their district lines although they do cooperate with other locally autonomous districts to provide educational opportunities for their students. (*See, e.g.*, "Special Education" and "Vocational Education" sections *supra*).

As discussed earlier, plaintiffs' reliance on the older Eighth Circuit cases of *Morrilton*, *Kinloch*, and *Haney* is misplaced because those cases involve racial gerrymandering of school district lines, an issue absent here. Likewise, plaintiffs' reliance on the Indianapolis and Pennsylvania cases is inappropriate because there, state legislation having obvious multidistrict racial effect was found as the basis for interdistrict relief. *See, United States v. Board of School Commissioners*, 637 F.2d 1101 (7th Cir.) *cert. denied* 449 U.S. 838 (1980) and *Hoots v. Pennsylvania*, 672 F.2d 1107 (3rd Cir.) *cert. denied*, 103 S.Ct. 55 (1982).

Recent cases applying the interdistrict standards of *Milliken* have summarily rejected all-encompassing allegations unsupported by evidence of significant interdistrict violations. *See, e.g., Bronson v. Board of Education*, 578 F.Supp. 1091 (S.D. Ohio 1984), *Goldsboro City Board of Education v. Wayne County Board of Education*, No. 81-43-CV-8 (E.D. N.C. June 10, 1983), and *Armour v. Nix*, No. 16708 (N.D. Ga. Sept. 24, 1979) *aff'd mem.*, 446 U.S. 930 (1980). The similarity between plaintiffs' theories and evidence in those cases and the case at bar confirms the Court's conclusions herein. Even if the Court were to view plaintiffs' evidence liberally, which under Rule 41(b) it is not required to do, the violations proved are at most, *de minimis* and far removed in time. Therefore, interdistrict relief must be denied and the Rule 41(b) motions of the SSDs granted.

Accordingly, it is hereby

ORDERED that the Rule 41(b) motions filed by the following school districts and their superintendents are granted: Blue Springs Reorganized School District R-IV, Center School District No. 58, Fort Osage Reorganized School District R-1, Grandview Consolidated School District No. 4, Hickman Mills School District, Independence School District, Lee's Summit Reorganized School District R-VII, Liberty School District, North Kansas City School District, Park Hill Reorganized School District No. 5, and the Raytown Consolidated School District No. 2.

/s/ Russell G. Clark
Russell G. Clark, Chief Judge
United States District Court

Dated: June 5, 1984

(3)

No. 88-64

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,

and

THE KANSAS CITY, MISSOURI SCHOOL DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT KCMSD

DAVID S. TATEL
ALLEN R. SNYDER *
PATRICIA A. BRANNAN
DANIEL B. KOHRMAN
HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5741

SHIRLEY WARD KEELER
BLACKWELL SANDERS MATHENY WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6800

Attorneys for Respondent Kansas City, Missouri School District

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Court of Appeals properly upheld the discretion of the District Court to apportion responsibility for plaintiffs' attorneys' fees between the State of Missouri and the Kansas City, Missouri School District based on their relative culpability and the relative amount of time required to litigate claims against them, which resulted in an order that the State pay all such fees.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	5
I. The Decision Below Apportioning Responsibility for Plaintiffs' Attorneys' Fees to the State of Missouri Is Not Contrary to This Court's Decision in *Kentucky v. Graham*	5
II. The Decision Below Apportioning Responsibility for Plaintiffs' Attorneys' Fees to the State of Missouri Is Consistent With Other Courts of Appeals Rulings Upholding Factual Findings by District Courts Concerning the Relative Culpability of Defendants and the Relative Time Required to Litigate Claims Against Them	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Charles v. Coleman, 689 F.2d 774 (8th Cir. 1982)	8
Council for Periodical Distributors Associations v. Evans, 827 F.2d 1483 (11th Cir. 1987)	7, 8, 9
Grendel's Den, Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1984)	8-9
Jenkins v. State of Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984)	2
Jenkins v. State of Missouri, No. 77-0420-CV-W-4 (W.D. Mo. May 11, 1987)	3, 4
Jenkins v. State of Missouri, No. 77-0420-CV-W-4 (W.D. Mo. June 25, 1988)	5
Jenkins v. State of Missouri, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, —— U.S. ——, 108 S. Ct. 70 (1987)	2, 5
Jenkins v. State of Missouri, 838 F.2d 260 (8th Cir. 1988)	*passim*
Jenkins v. State of Missouri, Nos. 86-1934WM, *et al.* (8th Cir. Aug. 19, 1988)	5
Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982)	8
Kentucky v. Graham, 473 U.S. 159 (1985)	5-6
Liddell v. Board of Education of St. Louis, 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981)	4
Little Rock School District v. Pulaski County Special School District, No. 1, 787 F.2d 372 (8th Cir.), *cert. denied*, 476 U.S. 1186 (1986)	8, 9
Moore v. City of Des Moines, 766 F.2d 343 (8th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986)	7
Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975)	7, 8
Rose v. Nebraska, 748 F.2d 1257 (8th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985)	8
School District of Kansas City, Missouri v. The State of Missouri, 460 F. Supp. 421 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979)	2

TABLE OF AUTHORITIES—Continued

	Page
Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981)	7, 9
United States v. Arkansas, 791 F.2d 1573 (8th Cir. 1986)	9
STATUTES	
42 U.S.C. § 1988	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-64

THE STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,

and

THE KANSAS CITY, MISSOURI SCHOOL DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT KCMSD

STATEMENT OF THE CASE

The attorneys' fees issues which are the subject of the State of Missouri's petition for certiorari arise out of a school desegregation suit initiated in 1977 by the Kansas City, Missouri School District ("KCMSD" or the "District") in order to secure the civil rights of its students and to enable the District to fulfill its constitutional re-

sponsibilities. KCMSD's Board of Directors determined that the District, on its own, had neither the authority nor the resources to overcome the legacy of nearly a century of State-mandated racial segregation. Accordingly, KCMSD and others, including several children in KCMSD schools, filed suit alleging that the State of Missouri and other government entities had operated a dual school system that segregated students on the basis of their race.

In 1978, the District Court realigned KCMSD as a defendant and required the student plaintiffs to obtain separate counsel, out of concern over potential conflicts of interest. *School District of Kansas City, Missouri v. The State of Missouri*, 460 F. Supp. 421, 435, 442 (W.D. Mo. 1978), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979). The student plaintiffs retained as counsel Mr. Arthur Benson, II, and, later, the NAACP Legal Defense and Educational Fund, Inc. Plaintiffs filed an Amended Complaint virtually identical to KCMSD's original complaint. Prior to trial, KCMSD filed cross-claims against the State and stipulated to its own liability; a lengthy trial ensued due to the refusal of the State to acknowledge its liability. *See Jenkins v. State of Missouri*, 838 F.2d 260, 266 (8th Cir. 1988); *Jenkins v. State of Missouri*, 593 F. Supp. 1485, 1487-88 (W.D. Mo. 1984), *citing* Stipulations of Fact filed February 21, 1984. KCMSD cooperated with the plaintiffs throughout pretrial preparations and during the course of the trial itself. *Jenkins v. State of Missouri*, 838 F.2d at 266.

In 1984, the District Court ruled in favor of plaintiffs against the State of Missouri and KCMSD, and in favor of KCMSD on its cross-claims against the State. *Jenkins v. State of Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984). The U.S. Court of Appeals for the Eighth Circuit, sitting en banc, affirmed those rulings of the District Court. *Jenkins v. State of Missouri*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 108 S. Ct. 70 (1987).

Both the plaintiffs and KCMSD filed applications for attorneys' fees with the District Court pursuant to 42 U.S.C. § 1988. After a one-day evidentiary hearing in February, 1987, the District Court denied KCMSD's application, but granted plaintiffs a substantial fee award, allocating responsibility for paying such fees solely to the State of Missouri. *Jenkins v. State of Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. May 11, 1987) ("Order of May 11, 1987").[1] The Eighth Circuit Court of Appeals unanimously affirmed the District Court's ruling in all respects and denied the State's petitions for rehearing and rehearing en banc. *Jenkins v. State of Missouri*, 838 F.2d 260 (8th Cir. 1988).

Respondent KCMSD files this brief in opposition to the State of Missouri's Petition for Writ of Certiorari, State of Missouri, *et al.* v. Kalima Jenkins, *et al.*, No. 88-64 ("State's Petition for Certiorari"), for the sole purpose of urging the Court to decline review of the second of the five issues presented by the State. That portion of the State's petition asks the Court to reexamine the Eighth Circuit's decision that the District Court was within its discretion in ruling that the State should bear full responsibility for payment of plaintiffs' attorneys' fees and that KCMSD is not obligated to pay any portion thereof. State's Petition for Certiorari at 7-8. The Eighth Circuit carefully reviewed the reasoning of the trial court and concluded that "[t]he district court based its award on the defendants' relative degrees of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants." 838 F.2d at 266. The Court of Appeals held that "[b]oth factors are appropriate considerations in determining who must shoulder the fees award." *Id.* at 266-67 (citations omitted). As to the first factor, the Court of Appeals noted that the District Court

---

[1] A full enumeration of the fees requested by and granted to the plaintiffs is set forth in plaintiffs' petition for a writ of certiorari. *See* Kalima Jenkins, *et al.* v. State of Missouri, *et al.*, No. 88-50.

relied on "its earlier conclusion that the State of Missouri was the primary constitutional violator." *Id.* at 266. The decision below also referred to the trial court's observation that the State of Missouri played a more active role than KCMSD in segregation within the District. *Id.*[2]

With respect to the time plaintiffs had to devote to their claims against the defendants in this case, the Eighth Circuit relied on the District Court's finding that "KCMSD had cooperated with the plaintiffs and had conceded liability prior to trial, while the State denied liability, thereby contributing to the necessity of a ten and a half month trial." 838 F.2d at 266.[3] Summarizing the trial court's findings, the Court of Appeals stated that "in effect the district court concluded that KCMSD minimized the need for plaintiffs to incur attorneys' fees, while the State maximized the need." *Id.*[4]

[2] The District Court described the State as primary constitutional violator "because it had mandated separate schools for black and white children prior to 1954, and after 1954 had failed to take any affirmative action to eliminate the vestiges and devastating effects of the dual school system it had created." Order of May 11, 1987, at 15. As the Court of Appeals noted, the District Court found that "[b]y contrast KCMSD did not cause the unlawful segregation but simply failed, as did the State, to disestablish the dual school system created by the State of Missouri and adopted policies which were ineffective in eliminating the unlawful segregation." 838 F.2d at 266. *See also* Order of May 11, 1987, at 15. The District Court also considered it significant that KCMSD was "originally a plaintiff in this action [and] was involuntarily made a defendant by the Court." *Id.*

[3] The District Court also pointed out that the District originally initiated this case as a plaintiff. Order of May 11, 1987, at 16. Regarding the reasonableness of the State's denial of liability and of the resulting length of the liability proceedings, the District Court viewed as important the fact that State of Missouri defendants had previously been "adjudged 'primary constitutional violators' in the St. Louis school desegregation case on facts very similar to those in the [Kansas City] case." *Id.* at 15-16. *See* Liddell v. Board of Education of St. Louis, 491 F. Supp. 351, 359 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981).

ARGUMENT

I. The Decision Below Apportioning Responsibility for Plaintiffs' Attorneys' Fees to the State of Missouri Is Not Contrary to This Court's Decision in *Kentucky v. Graham.*

Section B (Question No. 2) of the State of Missouri's Petition for Certiorari,[5] declares that the Court of Appeals' decision allocating to the State all responsibility for plaintiffs' attorneys' fees is "contrary to" this Court's decision in *Kentucky v. Graham*, 473 U.S. 159 (1985). State's Petition for Certiorari at 7. The *Graham* decision does not concern the allocation of attorneys' fees between multiple defendants, however, and there is no reason to

[4] The attorneys' fees at issue in the pending petitions for certiorari include work in the pending liability phase of this case and in proceedings to establish a remedy to eliminate the vestiges of the State-mandated segregated school system within the KCMSD. Throughout the remedy proceedings, the District has worked with the plaintiffs to develop effective remedial programs, and the District has been the moving party in establishing the principal components of the remedy. The State, meanwhile, has opposed virtually every program advanced by KCMSD and the plaintiffs, including those that have been approved by the Eighth Circuit and the District Court. *See* Jenkins v. State of Missouri, Nos. 86-1934WM, *et al.* (8th Cir. Aug. 19, 1988) (affirming remedy decision providing magnet schools and capital facilities); Jenkins v. State of Missouri, 807 F.2d 657, 684-686 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 108 S. Ct. 70 (1987) (affirming liability decision and educational programs for remedy); Jenkins v. State of Missouri, No. 77-0420-CV-W-4 (W.D. Mo. June 25, 1988) (order approving virtually all of KCMSD's desegregation budget for years 4 through 6 of remedial plan).

[5] KCMSD's Brief in Opposition is addressed only to Section B of the State's Petition for Certiorari, which concerns Question No. 2 of the five questions posed by the State for review by this Court. The remaining issues raised by the pending petitions for certiorari present questions affecting only the plaintiffs and the State.

believe this Court intended its reasoning in *Graham* to apply to such a case.

In *Graham*, this Court considered an attorneys' fees award against the Commonwealth of Kentucky arising from a finding of liability against several state and local law enforcement officers in a civil rights action. The Court reversed the fee award on the grounds that the Commonwealth of Kentucky was not a defendant in the lawsuit and could not be held responsible simply because it was the employer of the defendant individuals held personally liable. 473 U.S. at 167-69.

The *Graham* decision says nothing about how a trial court should allocate a fee award between multiple defendants. Rather, this Court's opinion concerned the impropriety of an award against a non-party. In particular, the Court expressed its desire to clarify "once again the distinctions between personal- and official-capacity suits." 473 U.S. at 163. Nevertheless, the State asks this Court to apply certain broad language in *Graham* to the question of fee apportionment in this case, and thus, to adopt an interpretation of *Graham* that is wholly unwarranted.[6] The State notes the *Graham* Court declared that "liability on the merits and responsibility for fees go hand in hand," 473 U.S. at 165, but the State fails to acknowledge the narrow context of this statement. The Court should decline the State's invitation to drastically expand the holding in *Graham* to state that reflexively, in every civil rights case, trial courts must allocate responsibility for attorneys' fees among co-defendants according

[6] A close reading of the State's Petition for Certiorari reveals that the State itself does not believe, as it suggests in its statement of its argument, that *Kentucky v. Graham* requires the allocation to KCMSD of some portion of plaintiffs' attorneys' fees. The State's petition argues merely that such a result is "[t]he logical extension" of certain passages in *Graham*. State's Petition for Certiorari at 7-8.

to their liability for the costs of a remedy, regardless of the trial judge's factual findings concerning the relative culpability of the defendants and the relative amount of time required to litigate claims against them.

II. The Decision Below Apportioning Responsibility for Plaintiffs' Attorneys' Fees to the State of Missouri Is Consistent With Other Courts of Appeals Rulings Upholding Factual Findings by District Courts Concerning the Relative Culpability of Defendants and the Relative Time Required to Litigate Claims Against Them.

It is undisputed that the Eighth Circuit properly held that the District Court's allocation of responsibility for attorneys' fees was "reversible only in the event of abuse of discretion." 838 F.2d at 267, *citing Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1125-26 (9th Cir. 1981). *See Council for Periodical Distributors Associations v. Evans*, 827 F.2d 1483, 1488 (11th Cir. 1987); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1357 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975). *See also Moore v. City of Des Moines*, 766 F.2d 343, 346 (8th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986) (district courts have "wide discretion in the award of attorneys' fees" and an "appeal lies only where the district court has abused its legal discretion").

The Court of Appeals evaluated the factors considered by the District Court in apportioning fees and reviewed the evidence summoned by the District Court in its discussion of those factors. The State does not question the holding in the decision below that the evidence relied on by the District Court in apportioning fees, described *supra* at 3-5, was adequate to support the District Court's "decision to place responsibility for the fees on the State." 838 F.2d at 267. Rather, the State challenges the Eighth Circuit's approval of the apportionment factors relied on by the trial court.

The Court of Appeals had ample authority for its ruling that the District Court properly considered two particular factors with respect to the allocation of attorneys' fees: "the defendants' relative degree of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants." 838 F.2d at 266. As the decision below recognized, consideration of defendants' degree of culpability in apportioning responsibility for fees has repeatedly been approved in the Eighth Circuit. *Id.* at 266-267, *citing Rose v. Nebraska*, 748 F.2d 1257, 1264 (8th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985); *Charles v. Coleman*, 689 F.2d 774, 777 (8th Cir. 1982); *Little Rock School District v. Pulaski County Special School District No. 1*, 787 F.2d 372, 374 (8th Cir.) (Arnold, J., concurring and dissenting), *cert. denied*, 476 U.S. 1186 (1986). *See also Rogers v. International Paper Co.*, 510 F.2d 1340, 1357 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975) (trial court should weigh culpability of defendants, among other factors, on remand).

The same rule has been followed in other Courts of Appeals. *See Council For Periodical Distributors Associations v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987) ("In cases such as the one now before the court, . . ., it may be appropriate for a district court to apportion fees between the active instigator of a wrong and a more passive co-defendant who had a more peripheral role in the wrong"); *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982) (the trial judge's "decision to apportion fees according to relative culpability was within his discretion").

In approving the District Court's consideration of time spent litigating against each defendant as a factor in apportioning attorneys' fees in this case, the Eighth Circuit relied primarily on decisions by other Circuit Courts of Appeals favoring such a practice. 838 F.2d at 267, *citing Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 960

(1st Cir. 1984); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1125-26 (9th Cir. 1981). *See id., citing* Judge Arnold's concurring and dissenting opinion in *Little Rock School District v. Pulaski County Special School District No. 1*, 787 F.2d 372, 374 (8th Cir.), *cert. denied*, 476 U.S. 1186 (1986). *Accord Council for Periodical Distributors Associations v. Evans*, 827 F.2d 1483, 1488 (11th Cir. 1987). The importance of such considerations in allocating fees was also recognized in *United States v. Arkansas*, 791 F.2d 1573, 1577-78 (8th Cir. 1986), in which the court considered a situation similar to that presented in this litigation. The Eighth Circuit declared that when a state and local school districts are co-defendants in a school desegregation case, and the local districts undertake a more vigorous, extensive defense, the state should not be required to pay the local districts' legal fees.

In light of these authorities, there is simply no basis for the suggestion in Section B of the State's Petition for Certiorari that the District Court committed an abuse of discretion by applying the wrong factors in apportioning responsibility for plaintiffs' attorneys' fees in this case. The State cites no authority for the proposition that it is reversible error for a trial court not to allocate responsibility for attorneys' fees in a civil rights case according to the extent of multiple defendants' liability for remedial costs, when that trial court, in apportioning fees, has thoroughly considered the defendants' relative culpability and the relative time required to litigate claims against them. There is accordingly no foundation for the State's position that the Court of Appeals erred in upholding the trial court's discretion to determine that the State of Missouri should bear all responsibility for plaintiffs' fees.

The decision below correctly applied existing law to the facts presented to the District Court, and moreover, is not in conflict with any other circuit court decision. The

Eighth Circuit's ruling consequently presents no basis for the Court to grant further review.

CONCLUSION

For the reasons set forth above, the State of Missouri's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID S. TATEL
ALLEN R. SNYDER *
PATRICIA A. BRANNAN
DANIEL B. KOHRMAN
HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5741

SHIRLEY WARD KEELER
BLACKWELL SANDERS MATHENY
WEARY & LOMBARDI
Two Pershing Square
2300 Main Street, Suite 1100
Kansas City, Missouri 64141
(816) 274-6800

Attorneys for Respondent Kansas City, Missouri School District

* Counsel of Record

(4)

No. 88-64

FILED
SEP 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,

Petitioners,

vs.

KALIMA JENKINS, *et al.*,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS KALIMA JENKINS, *et al.* IN OPPOSITION TO THE PETITION

JAY TOPKIS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARTHUR A. BENSON, II
911 Main Street—Suite 1430
Kansas City, Missouri 64105
(816) 842-7603

RUSSELL E. LOVELL, II
3111 40th Place
Des Moines, Iowa 50310
(515) 271-2952

Attorneys for Respondents

*Counsel of Record

QUESTION PRESENTED

Does the Eleventh Amendment bar the adjustment of an award of attorneys' fees against a state under 42 U.S.C. § 1988 to compensate for delay in payment, when it is reversible error under state law for a trial court not to include an award of prejudgment interest against state agencies when fees are awarded?

TABLE OF CONTENTS

	Page
Question Presented	i
STATEMENT OF THE CASE	3
1. Litigation on the Merits.	3
2. The Fee Applications.	6
3. The District Court's Decision.	9
4. The Decision of the Court of Appeals.	10
ARGUMENT	
I. NO ELEVENTH AMENDMENT ISSUE IS RAISED SINCE MISSOURI LAW MANDATES THE AWARD OF PREJUDGMENT INTEREST AGAINST A STATE AGENCY	11
II. THE DECISION BELOW IS CLEARLY CORRECT	17
III. THE AMOUNT OF FEES APPROPRIATE IN THIS CASE WAS A MATTER WITHIN THE SOUND DISCRETION OF THE DISTRICT COURT	23
CONCLUSION	29

TABLE OF AUTHORITIES

Cases:	Page
Bernard McMenamy Contractors, Inc. v. Missouri State Highway Commission, 582 S.W.2d 305 (Mo. App. 1979)	15
Blanchard v. Bergeron, 831 F.2d 563 (5th Cir. 1987)	28
Brown v. Board of Education, 347 U.S. 483 (1954)	3
Cranford Co. v. City of New York, 38 F.2d 52 (2d Cir. 1930)	12
Denton Construction Co. v. Missouri State Highway Commission, 454 S.W.2d 44, 60 (Mo. 1970)	13, 15, 16
Garrett v. Citizens Saving Ass'n, 636 S.W. 2d 104 (Mo. App. 1982)	13, 14
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	26
Hensley v. Eckerhart, 461 U.S. 424 (1983)	7, 9, 10, 20, 23, 24, 26, 27
Hutto v. Finney, 437 U.S. 678 (1978)	20
Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986)(en banc), cert. denied, 484 U.S. ___, 98 L.Ed.2d 34 (1987)	6, 11

Jenkins v. Missouri, ___ F.2d ____
(8th Cir. Nos. 86-1934; 86-2537; 87-1749; 87-2299; 87-2300; 87-2588, August 19, 1988) 6

Knight v. DeMarea, 670 S.W.2d 59
(Mo. App. 1984) 15

Laughlin v. Boatmen's National Bank of St. Louis, 189 S.W.2d 974 (Mo. 1945) 14

Library of Congress v. Shaw, 478 U.S. 310 (1986) . . . . . .

Loeffler v. Frank, 486 U.S.__, 100 L.Ed.2d 549 (1988) 18

Moore v. City of Des Moines, 766 F.2d 343 (8th Cir. 1985), cert. denied, 474 U.S. 1060 (1986) 28

Pennsylvania v. Delaware Valley Citizens Council, 483 U.S. ___, 97 L.Ed.2d 585 (1987) . . . 14, 20

Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987) 17

St. Joseph Light & Power Co. v. Zurich Ins. Co., 698 F.2d 1351 (8th Cir. 1983) 13

Slay Warehouse Co., Inc. v. Reliance Insurance Co., 480 F.2d 214 (8th Cir. 1974) 13

Steppelman v. State Highway Comm'n of Missouri, 650 S.W.2d 343 (Mo. App. 1983) 16

United States v. Johnson, 268 U.S. 220 (1925) 26

United States v. North Carolina, 136 U.S. 211 (1890) 12

Vaughns v. Board of Education of Prince Georges County, 598 F. Supp. 1262 (D. Md. 1984), aff'd, 770 F.2d 1244 (4th Cir. 1985) 25

Virginia v. West Virginia, 238 U.S. 202 (1915) 12

Whalen, Murphy, Reid v. Estate of Roberts, 711 S.W.2d 587 (Mo. App. 1983) 14

Statutes:

28 U.S.C. § 2516 19

42 U.S.C. § 1988 . . . . . 14, 17, 20

Missouri Statutes: § 408.020 . . . . . 12, 14, 15, 16

Missouri Statutes: § 408.040 . . . 16

Other Authorities:

Stern, Gressman & Shapiro, Supreme Court Practice, 198 (6th Ed.) 22

No. 88-64

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,

and

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS KALIMA JENKINS, ET AL. IN OPPOSITION TO THE PETITION

Respondents Kalima Jenkins, et al., urge that the petition for a writ of certiorari be denied on a number of grounds: (1) the issue of whether the Eleventh Amendment bars compensation for

delay in payment in calculating an attorneys' fee against a state is not raised by the present case since Missouri, by statute, mandates the award of prejudgment interest on attorneys' fees awards against state governmental agencies; (2) the issue is not an important one, since it is clear that there is no bar under the Eleventh Amendment to the award of fully compensatory attorneys' fees by a federal court against a state agency; (3) the other issues relating to the amount of fees awarded by the district court and upheld by the court of appeals are not of importance, involve findings of fact that are not clearly erroneous but are fully supported by the record, and involve the application of established law to matters within the sound discretion of the district court.

STATEMENT OF THE CASE

The statement of the case in the petition does not adequately describe the outcome of the litigation on the merits nor the lengthy and thorough litigation of the fees application in the district court.

1. The Litigation on the Merits.

This case began as a challenge by the Kansas City, Missouri School District (KCMSD) against the State of Missouri for the defendant's failure to correct the severe problems of segregation and racial discrimination that had their origins in the statewide de jure school segregation that existed prior to this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954). Through a succession of orders of the district court, plaintiffs representing black school

children in the KCMSD were intervened, the KCMSD was realigned as a party defendant, and a series of suburban school districts were joined as parties defendant since the relief sought included, inter alia, interdistrict integration of school facilities.

Throughout the course of the litigation, the KCMSD admitted its historic responsibility for some of the remaining segregation in the system and, while nominally a defendant, in fact supported the plaintiffs during the litigation. The state, on the other hand, battled to the bitter end against any finding of liability and responsibility for providing any relief. After a lengthy trial of plaintiffs' case, the district court first found in favor of the suburban school districts as to their responsibility for the segregation of

KCMSD and therefore dismissed them from the case. The state persisted in its defense necessitating further proceedings on the merits as well as on relief.

Subsequently, the district court issued its decision holding the state liable for creating and maintaining, through its failure to carry out its duty to disestablish, the segregation and racial isolation of the KCMSD. The court found that state policies with regard to segregated schools within districts, the exclusion of black schools from suburban districts and their isolation in Kansas City, underfunding of black schools, discrimination in housing, and other matters, all were directly responsible for the creation of KCMSD as a black school district. It ordered further proceedings to determine appropriate relief and subsequently entered a series of remedial

orders that require the state and the KCMSD to spend a total to date of more than $400,000,000 in capital improvements, remedial programs, magnet schools, etc.[1]

2. The Fee Applications.

Following the decision finding liability on the part of the state, plaintiffs filed lengthy fee applications on behalf of private local counsel, Arthur Benson, as well as counsel provided by the NAACP Legal Defense and Educational Fund, Inc. The applications meticulously detailed all of the time spent by attorneys, paralegals, and law clerks, as well as all expenditures. The applications then excluded time that was allocable to the claims relating to the

[1]The Eight Circuit has affirmed the district court's remedial orders in nearly all respects. Jenkins v. Missouri, ___ F.2d ____ (8th Cir. Nos. 86-1934; 86-2537; 87-1749; 87-2299; 87-2300; 87-2588, August 19, 1988).

issues and defendants concerning which plaintiffs had not prevailed, pursuant to this Court's decision in Hensley v. Eckerhart, 461 U.S. 424 (1983).[2] All other time, it was urged, was either clearly allocable to claims upon which plaintiffs had prevailed or was spent on tasks regarding which prevailing and non-prevailing claims were interwoven and interrelated. The state filed lengthy objections and took the position that not only should clearly allocable time be excluded, but that then an arbitrary fifty percent of all remaining time be excluded on the assumption that that amount of time was probably spent on non-prevailing

[2]Benson cut 2017 attorney hours and 2521 paralegal hours from his claim. The total Benson reduction was approximately 21% of Benson's requested lodestar. The LDF attorneys eliminated 1611 attorney hours, 319 recent law graduate hours, 920 paralegal hours, and 3286 law clerk hours. The total LDF reduction was approximately 16% of LDF's lodestar request.

issues. Although the state made some generalized objections to specific entries and to the requested hourly rates, it conducted no discovery.

The district court held a one-day hearing on the fee applications. At the hearing, the plaintiffs put on two expert witnesses, William Taylor, Esq., an expert in the area of school desegregation litigation, and Mr. Robert Weil, an expert in the area of the economics of legal practice. Mr. Taylor testified concerning the interrelatedness of the issues litigated in the case and the excellent results obtained. Mr. Weil testified concerning appropriate hourly rates for the lawyers, paralegals, and law clerks, and concerning the absolute necessity for compensating for delay in payment in order to be able to attract attorneys to take on this type of case.

Further testimony was given by a prominent local Kansas City attorney concerning hourly rates and the undesirability of a civil rights case of the magnitude of the present one.

The state put on no testimony of its own, except to call Mr. Arthur Benson, plaintiffs' local counsel, to the stand to ask a few questions about his application.

3. The District Court's Decision.

Following the hearing, both sides submitted proposed findings of fact and were give an opportunity to supplement the record. The district court entered its order accompanied with detailed findings of fact regarding the reasonableness of the hours requested and the hourly rates. With regard to Hensley reductions, the court found that the specific allocations made by plaintiffs were accurate and the other work was so interrelated between

further reductions were not appropriate. The court made similar findings with regard to expenses as well as specific findings regarding hourly rates of attorneys, paralegals, and law clerks.

4. The Decision of the Court of Appeals.

On appeal, the state pursued its various arguments relating to proper Hensley reductions in view of the decisions of the district court and the court of appeals on the merits of the case. The court of appeals upheld the district court in all respects, holding that its findings were fully supported by the record. The full court declined to hear the case en banc, thereby implicitly rejecting the state's argument that the panel decision on attorneys' fees was in any way inconsistent with the en banc decision on the merits rendered just one year before. Jenkins v. Missouri, 807

year before. Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986)(en banc), cert. denied, 484 U.S. _____, 98 L.Ed.2d 34 (1987), Appendix, p. A50. Judge John Gibson, the author of the en banc decision on the merits was also the author of the panel decision on attorneys' fees.

ARGUMENT

I.

NO ELEVENTH AMENDMENT ISSUE IS RAISED SINCE MISSOURI LAW MANDATES THE AWARD OF PREJUDGMENT INTEREST AGAINST A STATE AGENCY

As we demonstrate in Part II, infra, the Eleventh Amendment does not bar a federal court from including compensation for delay in payment when it awards attorneys' fees against a state. However, this issue would never be reached in this case because of the well established rule that even in circumstances where there is a general

prohibition against the award of interest against a state, that prohibition disappears if state law itself permits such an award. See United States v. North Carolina, 136 U.S. 211 (1890); Virginia v. West Virginia, 238 U.S. 202 (1915); Cranford Co. v. City of New York, 38 F.2d 52 (2d Cir. 1930). Since Missouri law not only allows but mandates awards of interest against state governmental agencies, including prejudgment interest on fees claims, the inclusion of interest in the fees awarded by the federal court was consistent with Missouri law; as a result, the Eleventh Amendment issue sought to be presented here simply does not arise.

Section 408.020 of the Missouri Statutes[3] has been construed by the

---

[3]Section 408.020 provides:

Creditors shall be allowed to receive interest at the rate of nine

Missouri Supreme Court to require trial courts to award prejudgment interest whenever the amount due is liquidated, or, although not strictly liquidated, is readily ascertainable by reference to recognized standards. Denton Construction Co. v. Missouri State Highway Commission, 454 S.W.2d 44, 60 (Mo. 1970); St. Joseph Light & Power Co. v. Zurich Ins. Co., 698 F.2d 1351, 1355 (8th Cir. 1983); see also, Slay Warehouse Co., Inc. v. Reliance Insurance Co., 480 F.2d 214, 215 (8th Cir. 1974)("[T]he award of prejudgment interest in a case in which Section 408.020 is

---

percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

applicable is not a matter of court discretion; it is compelled.") It is readily evident from a substantial body of Missouri case law that attorneys' fees awards pursuant to 42 U.S.C. § 1988, based as they are on the lodestar method of calculation, are readily ascertainable within the meaning of § 408.020 and therefore must include an award of prejudgment interest.

Prejudgment interest under § 408.020 has been awarded in quantum meruit actions on unliquidated claims for legal services that were measured and determined by the standard of reasonable value of services rendered. Laughlin v. Boatmen's National Bank of St. Louis, 189 S.W.2d 974 (Mo. 1945); Garrett v. Citizens Saving Ass'n, 636 S.W. 2d 104, 112 (Mo. App. 1982). See also, Whalen, Murphy, Reid v. Estate of Roberts, 711 S.W.2d 587, 590 (Mo. App.

1983), holding that the trial court erred in not awarding prejudgment interest on an attorney's fees claim and that plaintiff's failure to "receive an award for the full amount of the claim does not bar the right to receive pre-judgment interest on the amount the trial court actually awarded." Thus, the fact that the defendant denies liability or challenges the amount claimed will not relieve the defendant of his duty to pay the prejudgment interest of the award found to be due. Knight v. DeMarea, 670 S.W.2d 59 (Mo. App. 1984); St. Joseph Light & Power Co. v. Zurich Ins. Co., supra.

Finally, the Missouri courts have also made clear that § 408.020 is fully applicable in litigation involving the State of Missouri as a defendant. Denton Construction, supra, Bernard McMenamy Contractors, Inc., v. Missouri State

Highway Commission, 582 S.W.2d 305 (Mo. App. 1979). Indeed, the state defendants' argument that the prejudgment interest provision of § 408.020 did not authorize awards against the state was expressly rejected in Steppelman v. State Highway Comm'n of Missouri, 650 S.W.2d 343, 345 (Mo. App. 1983), citing Denton Construction and McMenamy Contractors.[4]

Since under Missouri law the award of prejudgment interest is permissible against the state or one of its agencies, and would be mandated by Missouri Statute § 408.020 with regard to plaintiffs' attorneys' fees claim in the instant case, there can be no bar under the Eleventh Amendment or otherwise to such an award by

---

[4]Section 408.040 of the Missouri Statutes, which provides for interest on judgments or orders of any Court, has also been interpreted to permit the award of post-judgment interest against the state of Missouri. Steppelman, supra at 345.

a federal court. Thus, whatever may be the resolution of the issue posed by Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987), it simply does not arise in the present case and should not be addressed herein by the Court.

II.

THE DECISION BELOW IS CLEARLY CORRECT

The Eighth Circuit correctly rejected the view of the First Circuit in Rogers v. Okin, supra, that this Court's decision in Library of Congress v. Shaw, 478 U.S. 310 (1986) somehow barred the use of current rates to compensate attorneys under 42 U.S.C. § 1988 when fees are awarded against a state agency. As we will explain below, the First Circuit's decision is based on a fundamental misreading of Shaw and the Eleventh Amendment and is not likely to be followed by any other court. Moreover,

the limited nature of the Shaw rule, as explicated by this Court in the recent decision of Loeffler v. Frank, 486 U.S.__, 100 L.Ed.2d 549 (1988), and the unlikelihood that the issue will arise in other cases, make the issue presented unimportant. Respondents therefore urge that the Court should deny certiorari and decline to review the issue unless and until a widespread conflict among the courts of appeals becomes evident.

As explained in Loeffler, the Shaw rule derives from an ancient doctrine applicable only to federal agencies; that is, the federal government's sovereign immunity prohibits an award of interest against it unless Congress so provides either by a specific statute dealing with interest or by a general waiver of sovereign immunity with regard to a particular agency of the government. This

doctrine has been codified in 28 U.S.C. § 2516 and, therefore, is binding on the courts.

The Eleventh Amendment, the basis of the First Circuit's decision in Rogers, on the other hand, is not a general statement of sovereign immunity. Rather, as the Eighth Circuit correctly held in the present case, it is a limitation on the power of the federal courts to hear certain types of actions against states unless Congress provides otherwise or the state itself acquiesces in the jurisdiction of the federal courts expressly or by implication. Once, however, relief is properly awardable against a state, there are no general limitations on such relief that stem from any residual sovereign immunity that the state may claim.

Thus, as again the Eighth Circuit

properly held, the governing decision here is Hutto v. Finney, 437 U.S. 678 (1978), which held that fees could be awarded against a state pursuant to § 1988 despite the Eleventh Amendment. Hutto held that § 1988 was enacted pursuant to Congress' power to enact legislation to enforce the Fourteenth Amendment; therefore, that power overrode the Eleventh Amendment's limitation on the power of the federal courts.

Hutto held, in the alternative, that a reasonable attorney's fee in a suit against the state for prospective relief was itself prospective relief not barred by the Eleventh Amendment. Id. at 695. This latter ground was completely overlooked by the First Circuit in Rogers.

Once the court below had the power to assess fees against the defendant state at all, it had power to assess a fee that was

fully compensatory. As Loeffler makes clear,[5] an adjustment for delay in payment is part of a fully compensatory fee, but was not awardable against a federal government agency solely because of the sovereign immunity of the federal government itself.

Reading Rogers one is left with the firm impression that the parties viewed the Eleventh Amendment issue as an afterthought in an appellate battle that concentrated on issues raised by Hensley v. Eckerhart, 461 U.S. 424 (1983). Respondents submit there is reason to doubt whether the First Circuit's consideration of the Eleventh Amendment issue in Rogers was guided by the thorough briefing warranted by its

---

[5]See 100 L.Ed.2d at 558, n. 5. See also, Pennsylvania v. Delaware Valley Citizens Council, 483 U.S. ___, 97 L.Ed.2d 585, 592, 604-05 (1987).

complexity. First, the issue was neither raised in nor considered by the district court, since this Court's decision in Shaw was issued after the district court's fee award. 821 F.2d at 28. Second, the First Circuit itself expressly noted that the Eleventh Amendment issue "was allowed only five pages in [the Commonwealth's] 98-page main brief." 821 F.2d at 28. Respondents submit that the issue raised by petitioners was correctly resolved by the Eighth Circuit in the instant case by routine application of Eleventh Amendment case law, and that therefore certiorari should be denied until more than two courts of appeal have considered the question, since it is likely the seeming conflict may be resolved as a result of future cases in the courts of appeals. See Stern, Gressman & Shapiro, Supreme Court Practice 198, 200 (6th Ed.).

THE AMOUNT OF FEES APPROPRIATE IN THIS CASE WAS A MATTER WITHIN THE SOUND DISCRETION OF THE DISTRICT COURT.

Despite the efforts of the petitioners, the remaining issues presented by the petition for a writ of certiorari are simply not appropriate for review by this Court. As demonstrated by the decisions below and by the Statement of the Case above, there were no novel issues of law presented by the fee applications here. The problem faced by the district court was the correct application of the law as established by this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983) to a particular set of facts unique to this case. Indeed, the fees hearing was postponed until the Eighth Circuit's en banc decision on the merits had been reached, in order that the district court's Hensley determinations would be guided by the appeals court's

would be guided by the appeals court's decision. The parties were able to make as complete a factual record as they desired, argued their positions as to the proper application of Hensley, were provided a hearing by the district court, and submitted detailed proposed findings. The district court, after these exhaustive submissions, reviewed the record and made its findings of fact based not only on the fee applications and the evidence adduced in relation thereto, but on its own intimate knowledge of the litigation as a whole. Its resolutions of the myriad factual questions thus presented, which were upheld in their entirety by the court of appeals, simply do not merit the exercise of this Court's discretionary review.

In affirming the district court's application of Hensley, a resolution that

adopted the 15 to 20 percent lodestar reduction proposed by plaintiffs, the Eighth Circuit was cognizant that it was this same district court that had ruled against plaintiffs on their inter-district claims against the suburban districts and the federal defendants and thereby necessitated the application of Hensley in the first place. Without question, the district court had intimate familiarity with the plaintiffs' successful and unsuccessful claims, the interrelatedness of the claims, and the results obtained.[6]

---

[6]Petitioners also cite Vaughns v. Board of Education of Prince Georges County, 598 F.Supp. 1262 (D. Md. 1984), aff'd, 770 F.2d 1244 (4th Cir. 1985), for the proposition that expenses incurred on unsuccessful claims must be excluded per Hensley. Petitioners, however, do not claim that Vaughns represents a conflict among the circuits, as they indeed cannot, for the question of a percentage reduction of plaintiffs' expenses based on Hensley was not appealed to the Fourth Circuit. Furthermore, although the district court in Vaughns did apply the percentage reduction used on the fees claim to

Of course, this Court does not grant certiorari to review evidence and discuss specific facts. United States v. Johnson, 268 U.S. 220, 227 (1925). Although, as petitioner notes, the Eighth Circuit did comment that it "might not have arrived at the same result as the district court" had it fixed the initial percentage reduction, 838 F.2d at 264, it concluded the district court's Hensley findings were not clearly erroneous. Findings of fact made by the district court and concurred in by the court of appeals are subject to the "two court" rule, Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949),[7] the application of which is made

---

plaintiffs' expenses claim, the district court implied it retained discretion to conclude otherwise, stating only that "on a rough justice basis" the same percentage "is appropriate." Id. at 1290.

[7]"A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake

all the more compelling in the instant case because each of the judges on the panel that decided the fees appeal participated in the en banc decision on the merits and, most importantly, the judge who wrote the en banc decision also wrote the panel decision on fees.

In Hensley this Court expressed the strong view that fee applications should not give rise to extended independent litigation (461 U.S. at 437); a number of courts of appeals, including the Eighth Circuit, have repeatedly admonished that parties should not routinely seek review of the manner in which a district court has exercised its sound discretion in awarding fees, in the absence of compelling indications that that

---

to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." 336 U.S. at 275.

discretion has been abused. E.g., Moore v. City of Des Moines, 766 F.2d 343, 345-46 (8th Cir. 1985), cert. denied, 474 U.S. 1060 (1986). Nevertheless, petitioner has continued to pursue just such an appeal; to grant certiorari on the issues thus presented, would encourage other litigants, plaintiffs and defendants alike, to appeal fee decisions they are dissatisfied with and discourage the prompt compromise and reasonable resolution of fee claims.[8]

---

[8]Petitioners noted that this Court has granted review in Blanchard v. Bergeron, 831 F.2d 563 (5th Cir. 1987), review granted, No. 87-1485, 56 U.S.L.W. 3873 (June 28, 1988), and assert that Blanchard raises a "similar issue" to petitioners' contention that § 1988 does not permit the award of fees for paralegals and law clerks at market rates. Respondents would observe that the question of paralegal hourly rates, although raised, was not addressed by the Fifth Circuit in Blanchard. That court only held that a contingency fee agreement between plaintiff and his counsel would operate as a cap on the fee which could be recovered from the defendant. Because the fee cap imposed by the contingency agreement was apparently substantially below the lodestar, the Fifth Circuit declined any discussion of paralegal and law clerk hourly rates, stating only that such hours "would also naturally be included within the contingency fee." Id. at 564. Even if this Court reverses the Fifth Circuit's holding on the fee cap issue, it would seem unlikely that it would decide the paralegal rates issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAY TOPKIS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Ave. of the Americas
New York, N.Y. 10019
(212) 373-3000

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
99 Hudson Street
New York, N.Y. 10013
(212) 219-1900

ARTHUR A. BENSON, II
911 Main Street
Suite 1430
Kansas City, Mo. 64105
(816) 842-7603

RUSSELL E. LOVELL, II
3111 40th Place
Des Moines, Iowa 50310
(515) 271-2952

Attorneys for Respondents

*Counsel of Record

No. 88-64

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

WILLIAM L. WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
Supreme Court Building
Jefferson City, Missouri 65102
(314) 751-3321
MICHAEL L. BOICOURT*
Assistant Attorney General
BRUCE FARMER
Assistant Attorney General
Counsel for Petitioners

JAY TOPKIS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
99 Hudson Street
New York, New York 10013
(212) 219-1900
ARTHUR A. BENSON, II
911 Main Street—Suite 1430
Kansas City, Missouri 64105
(816) 842-7603
RUSSELL E. LOVELL, II
3111 40th Place
Des Moines, Iowa 50310
(515) 271-2952
Counsel for Respondents

*Counsel of Record

Petition for Certiorari Filed July 5, 1988
Certiorari Granted October 11, 1988

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

2214

TABLE OF CONTENTS

Opinions, decisions, judgments, and orders appearing in appendix to the printed Petition for Certiorari and omitted from this joint Appendix 1

Relevant docket entries 2

Order granting certiorari 19

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of the Court of Appeals for the Eighth Circuit, April 13, 1988 ..... A1

Order of the Court of Appeals for the Eighth Circuit, January 29, 1988 ..... A2

Order of the District Court for the Western District of Missouri, May 11, 1987 ..... A22

Order of the District Court for the Western District of Missouri, July 14, 1987 ..... A44

Order of the Court of Appeals for the Eighth Circuit, December 5, 1986 ..... A50

Order of the District Court for the Western District of Missouri, September 17, 1984 ..... A171

Order of the District Court for the Western District of Missouri, June 5, 1984 ..... A216

RELEVANT DOCKET ENTRIES

Date	NR.	Proceedings
1977		
May 26		COMPLAINT - with JS-44c - filed. (Sixty-seven summonses issued and delivered to the U. S. Marshal). Plt. $15.00
1979		
**Mar 14		DOCKET ENTRY OUT OF SEQUENCE.
Mar 15		Entry of Appearance - filed. (Arthur A. Benson II enters appearance as attorney for Margaret Stark and Catherine Stark by their next friend, Dorothy Hodge Johnson.)
Mar 30		NOTICE OF WITHDRAWAL - as Attorneys for Plaintiffs, filed. (James Borthwick, Shirley Keeler, Taylor Fields, and Robert Manley hereby withdraw as attorneys for Margaret and Catherine Stark, Arthur Benson, II having previously entered his appearance for these plaintiffs.
May 18	22	PLAINTIFFS' FIRST AMENDED COMPLAINT-for declaratory and injunctive relief- filed.
1982		
5/27/82	18	ENTRY - of appearance, of Jack Greenberg, James M Nabritt III, Lowell Johnston, James S. Liebman Steven L Winter and Theodore M. Shaw and

Date	NR.	Proceedings
		enter their appearance as counsel of record for the plaintiffs.
5/27/82	19	ENTRY - of appearance, of Richard L routman and Charles Thomas (for planintiffs.)
1983		
*Oct. 31	562	MINUTE SHEET - first day of trial.
*Nov. 1	563	MINUTE SHEET - second day of trial
*Nov. 2	564	MINUTE SHEET - third day of trial
Nov. 3	565	MINUTE SHEET - fourth day of trial
11/4/83	571	MINUTE SHEET - fifth day of court trial.
11/6/83	572	MINUTE SHEET - sixth day of court trial
11/7/83	573	MINUTE SHEET - Seventh Day of Court trial.
11/9/83	575	MINUTE SHEET - of Eighth day of court trial.
11/10/83	576	MINUTE SHEET - of ninth day of court trial.
11/14/83	581	MINUTE SHEET - of tenth day of court trial.
11/15/83	582	MINUTE SHEET - of elventh day of court trial.
11/16/83	585	MINUTE SHEET - of Twelfth day of court trial.

Date	NR.	Proceedings
11/17/83	586	MINUTE SHEET - 13th day of court trial.
11/28/83	592	MINUTE SHEET - 14th day of court trial.
11/29/83	593	MINUTE SHEET - 15th day of court trial.
11/30/83	594	MINUTE SHEET - 16th day of court trial.
12/1/83	595	MINUTE SHEET - 17th day of court trial.
12/5/83	598	MINUTE SHEET - 18th day of court trial.
12/6/83	602	MINUTE SHEET - of 19th day of court trial.
12/7/83	615	MINUTE SHEET - 20th day of court trial.
12/8/83	616	MINUTE SHEET - 21st day of court trial.
12/12/83	617	MINUTE SHEET - 22nd day of court trial.
12/13/83	620	MINUTE SHEET - of 23rd day of court trial.
12/14/83	621	MINUTE SHEET - of 24th day of court trial.
12/15/83	623	MINUTE SHEET - of 25th day of court trial
12/19/83	624	MINUTE SHEET - of 26th day of court trial.
12/20/83	629	MINUTE SHEET - of 27th day of court trial.
1984		
1/3/84	636	MINUTE SHEET - 28th day of court trial.
1/4/84	637	MINUTE SHEET - 29th day of court trial.

Date	NR.	Proceedings
*1/5/84	641	MINUTE SHEET - 30th day of court trial.
*1/6/84	642	MINUTE SHEET - 31st day of court trial.
*1/9/84	643	MINUTE SHEET - 32nd day of court trial.
*1/10/84	644	MINUTE SHEET - 33rd day of court trial.
*1/11/84	645	MINUTE SHEET - 34th day of court trial.
*1/12/84	646	MINUTE SHEET - 35th day of court trial.
1/16/84	647	MINUTE SHEET - 36th day of court trial.
1/17/84	648	MINUTE SHEET - 37th day of court trial.
1/18/84	650	MINUTE SHEET - 38th day of court trial.
1/19/84	652	MINUTE SHEET - 39th day of court trial.
1/23/84	660	MINUTE SHEET - 40th day of court trial.
1/24/84	665	MINUTE SHEET - of 41st day of trial.
1/25/84	667	MINUTE SHEET - 42nd day of court trial.
1/26/84	668	MINUTE SHEET - 43rd day of court trial.
1/30/84	671	MINUTE SHEET - 44th day of court trial.
1/31/84	672	MINUTE SHEET - 45th day of court trial.
2/1/84	673	MINUTE SHEET - 46th day of court trial.
2/2/84	674	MINUTE SHEET - 47th day of court trial. (In open court plaintiff's motion to add Robert Murphy to witness list is denied. In open court plaintiff's motion to complete the testimony of Wm. A. Cleaver is denied.)
2/6/84	679	MINUTE SHEET - 48th day of court trial.

Date	NR.	Proceedings
2/7/84	680	MINUTE SHEET - 49th day of court trial.
2/8/84	681	MINUTE SHEET - 50 th day of court trial.
2/9/84	682	MINUTE SHEET - 51st day of court trial.
2/13/84	687	MINUTE SHEET - of 52nd day of court trial
2/14/84	688	MINUTE SHEET - of 53rd day of court trial
2/15/84	689	MINUTE SHEET - of 54th day of court trial.
2/16/84	697	MINUTE SHEET - of 55th day of court trial. Plaintiff's motion for protective order argued in open court. Motion DENIED on the record at 3: 50 p.m.
2/21/84	703	MINUTE SHEET - 56th day of court trial.
2/22/84	705	MINUTE SHEET - 57th day of court trial.
2/23/84	706	MINUTE SHEET - 58th day of court trial
2/27/84	707	MINUTE SHEET - 59th day of court trial. Defendant U.S. Dept of Education's motion in limine filed on 2/9/84 sustained in open court on the record at 10:00 a.m.
2/27/84	711	MINTUE SHEET - 60th day of court trial
2/29/84	713	MINUTE - sheet 61st day of court trial.
3/1/84	756	MINUTE SHEET - of 62nd day of court trial.
3/5/84	780	MINUTE SHEET - 63rd day of court trial.

Date	NR.	Proceedings
3/6/84	806	MINUTE SHEET - 64th day of court trial. PLAINTIFFS REST AT 10:37 a.m. Various motions filed.
3/7/84	887	MINUTE SHEET - 65th day of court trial. KCMSD begins presenting testimony and evidence.
3/8/84	894	MINUTE SHEET - 66th day of trial Defendant KCMSD presenting evidence.
3/12/84	916	MINUTE SHEET - of the 67th day of court trial. KCMSD presenting evidence on counterclaim.
3/13/84	933	MINUTE SHEET - 68th day of court trial. KCMSD presenting evidence on counterclaim and rests.
4/2/84	972	MINUTE SHEET - 69th day of court trial. Opening statements by Mr Marshal for the state of Missouri. Defendant State of Mo presenting evidence.
4/3/84	973	MINUTE SHEET - 70th day of court trial.
4/4/84	974	MINUTE SHEET - 71th day of court trial.
4/5/84	975	MINUTE SHEET - 72st day of court trial.
4/9/84	976	MINUTE SHEET - 73nd day of court trial.
4/10/84	980	MINUTE SHEET - 74rd day of court trial.
4/11/84	981	MINUTE SHEET - 75th day of court trial.
4/12/84	982	MINUTE SHEET - 76th day of court trial
4/16/84	984	MINUTE SHEET - 77th day of court trial.

Date	NR.	Proceedings
4/17/84	985	MINUTE SHEET - 78th day of court trial.
4/18/84	986	MINUTE SHEET - 79th day of court trial.
5/2/84	993	STATEMENT - of Visiting Attorney and Entry of Appearance as additional counsel for plaintiffs. (C. Stephen Ralston -NAACP Legal Defense and Education Fund 99 Hudson St, New York, New York 10013)
5/7/84	994	MINUTE SHEET - 80th day of court trial. Opening statement by Ms. Berkley for Federal Defendants, and Federal defendants present evidence.
5/8/84	995	MINUTE SHEET - 81st day of court trial
5/9/84	996	MINUTE SHEET - 82nd day of court trial.
5/10/84	997	MINUTE SHEET - 83rd day of court trial.
5/14/84	998	MINUTE SHEET - 84th day of court trial. (FEDERAL DEFENDANTS RESTS at 12:19 p.m.)
5/16/84	999	MINUTE SHEET - 85th day of court trial. Plaintiff makes oral motion for sanciont re: HUD which is denied by the court and and an oral motion re; protective order CRA, which is denied in open court. State defendants rests at 10:47 p.m. Plaintiff and KCMSD begin joint rebuttal testimony.
5/17/84	1000	MINUTE SHEET - 86th day of court trial.
5/21/84	1002	MINUTE SHEET - 87th day of court trial.

Date	NR.	Proceedings
5/22/84	1003	MINUTE SHEET - 88th day of court trial
06/05	1004	ORDER - GENERAL MEMORANDUM AND ORDER. ORDERED that the Rule 41(b) motions filed by the following school districts & their superintendents are granted: Blue Springs Reorganized School District R-IV, Center School District No. 58, Fort Osage Reorganized School District R-1, Grandview Consolidated School District No. 4, Hickman Mills School District, Independence School District, Lee's Summit Reorganized School District R-VII, Liberty School District, North Kansas City School District, Park Hill Reorganized School District No. 5, and the Raytown Consolidated School District No. 2.
*5/29/84	1006	MINUTE SHEET - of 89th day of court trial.
5/30/84	1007	MINUTE SHEET - of 90th day of court trial.
5/31/84	1008	MINUTE SHEET - of 91st day of court trial. Plaintiff's have no further rebuttal evidence, and Deft KCMSD has no further rebuttal evidence.
6/13/84	1016	MINUTE SHEET - 92nd day of court trial. State of Mo presents surrebuttal testimony. Trial Adjourned.

Date	NR.	Proceedings
6/21/84	1018	ORDER - filed, mailed. (ORDERED that the judgment of June 11, 1984 is recalled and the order of June 5, 1984 is amended so that final judgment dismissing the suburban school districts shall issue when all claims are resolved and this court's final opinion is rendered.)
9/17/84	1023	ORDER - filed, mailed. (ORDERED that the Clerk is directed to enter judgment on the issue of liability in favor of HUD and against plaintiffs; in favor of plaintiffs and against the State defendants and the KCMSD; and in favor of the KCMSD and against the State defendants on its cross-claim; and it is further ORDERED that within 90 days from the date of this order, the State Board of Education and the KCMSD board of Education are directed to submit a proposed plan which will have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD: and it is further ORDERED that plaintiffs shall have 30 days after the proposed plan is filed in which to file objections to it.)
1985		
4/29/85	1084	MINUTE SHEET - 1st day of remedy hearing. Parties appear and are ready for hearing. Plt by Arthur Benson and James Liebman. Kansas City School District by James Borthwick and Shirley Keeler. State of Missour by Bruce Farmer, B. Farr, J. Klein, P. Huber and R. Toranto. Teachers Union by Michael Gordon. KCMSD presents textimony and evidence. Hearing continued to 4/30/85 at 8:30 a.m.

Date	NR.	Proceedings
4/30/85	1086	MINUTE SHEET - 2nd day of remedy hearing. KCMSD presenting testimony and evidence. Hearing continued to 5/1/85 at 8:30 a.m.
5/1/85	1087	MINUTE SHEET - 3rd day of remedy hearing. KCMSD Presnting testimony and evidence. Hearing continued to 5/2/85 at 8:30 a.m.
5/2/85	1088	MINUTE SHEET - 4th day of remedy hearing. KCMSD Presenting case and concludes. State of Mo begins presenting evidence and testimony. Hearing continued to 5/6/85 at 8:30 a.m.
5/6/85	1089	MINUTE SHEET - 5th day of remedy hearing. State still presenting case. Hearing continued to 5/7/85 at 8:30 a.m.
5/7/85	1091	MINUTE SHEET - 6th day of remedy hearing. State still presenting evidence. Hearing continued to 5/8/85 at 8:15 a.m.

Date	NR.	Proceedings
5/8/85	1092	MINUTE SHEET - 7th day of remedy hearing. State presents evidence and concludes at 1:41 p.m. Plaintiffs - opening statement by Mr Liebman and presents evidence. Hearing continued to 5/9/85 at 8:30 a.m.
5/9/80	1093	MINUTE SHEET - 8th day of remedy hearing. Plaintiff still presenting case. Plaintiff rests at 5:12 p.m. Hearing continued to 5/10/85 at 8:30 a.m.
5/10/85	1094	MINUTE SHEET - 9th day of remedy hearing. KCMSD Has rebuttal testimony. closing argument by State of Mo. KCMSD Local 91 and Plaintiffs. Court is adjourned.
6/14/85	1110	MEMORANDUM - opinion (re- remedy) Copies distributed.
1986		
2/5/86	1154	MOTION - for partial award of attorneys' fees & expenses, w/suggestions (by plts).
2/11/86	1156	MOTION - for partial interim award of attorneys' fees & expenses, w/memorandum & affidavits - plt.
2/20/86	1157	RESPONSE - to plts' request for an immediate ward of attorneys' fees - state dfts.
2/24/86	1158	ORDER - that Mr. Arthur Benson, II, is entitled to an immediate award as

Date	NR.	Proceedings
		partial payment of attorney's fees in the amount of $200,000.00 to be paid by the state dfts; - that the immediate award of $280,-000.00 in partial payment to the NAACP Legal Defense Fund, Inc. is presently denied without prejudice. Mailed (#1156)
5/14/86	1170	MOTION - for extension of time in which to file their response to plts' request for attorneys' fees - state dfts.
5/20/86	1174	ORDER - that the State of Missouri shall, on or before 6/2/86, pay to Arthur A. Benson, II, the sum of $100,000.00 as partial attorneys fees in this case. - that the State of Missouri shall file its response to the pending applications for attorneys fess & expenses on or before 6/17/86. Mailed.
6/11/86	1191	SUPPLEMENTAL APPLICATION - for fees & expenses - plts.
6/17/86	1193	RESPONSE - to plts' motions for attorneys' fees - state dfts.
6/20/86	1198	RESPONSE - to plts' supplemental application for fees & expenses - state dfts.
6/30/86	1199	MOTION - for immediate interim award of undisputed attorneys' fees costs,

Date	NR.	Proceedings
		w/memorandum - plts NAACP Legal Defense & Education Fund, Inc.
6/30/86	1200	MOTION - for immediate interim award of undisputed attorney's fees costs, w/suggestions - plts.
7/1/86	1201	FINAL APPLICATION - for fees & expenses for the 1985-86 school year - plts.
7/2/86	1202	RESPONSE - to plts' motion for immediate interim award of undisputed attorney's fees & costs - state dfts.
8/1/86	1207	REPLY - to State's response filed 6/23/86 to plts' supplemental application for fees & expenses - plts.
9/19/86	1222	REPLY - to state dfts' response to plts' motions for attorneys' fees w/memorandum - plts.
9/19/86	1223	SUPPLEMENT - to original Benson fee application - plts.
9/22/86	1224	AFFIDAVIT - of John O. Ward in support of plts' motion for attorneys' fees.
9/22/86	1225	ORDER - On 9/19/86, a conference was held regarding plts' applications for fees & expenses. As a result, the State of Mo. was directed to advance Arthur Benson the agreed upon sum of $47,-332.93. This amount consists of:

Date	NR.	Proceedings
		Attorney's Fees
		$29,018.03 Unpaid balance of the $329,018.03 that the State admits is owed plts. Page 67 of the State Dfts' response to plts' motions for attorneys' fees filed 6/17/86.
		$16,583.50 Page 5 of State dfts' response to plt's supplemental application for fees & expenses filed 6/20/86.
		$ 1,731.40 Page 12 of State dft's response to plt's supplemental application for fees & expenses filed 6/20/86.
		Mailed.
1987		
*1/16/87	1253	CERTIFICATE - of service of plts' Supplemental Memorandum and Reply to State dfts' Response to plts' Motion for Attys' fees.
*1/16/87	1254	SUPPL. MEMORANDUM - And Reply to State dfts' Response to plts' Motion for attys fees by plts.
2/17/87	1266	REPLY - to plts' motions for attorneys' fees & expenses - State dfts.

Date	NR.	Proceedings
2/27/87	1274	MINUTE SHEET - of Hearing on Motion for Plts' Attorneys' fees. (Matter taken under advisement).
3/11/87	1280	TRANSCRIPT - of proceedings, taken on 2/27/87 on a hearing
3/13/87	1283	PROPOSED FINDINGS - of Fact and Conclusions of Law by plts.
3/13/87	1284	AFFIDAVITS - in support of Fee application fees by plts.
3/26/87	1292	POST-HEARING - of state dfts' Memorandum concerning atty's fees
3/26/87	1293	PROPOSED FINDINGS - of Fact and Conclusions of Law by state dfts.
5/11/87	1327	ORDER - filed, mailed. (ORDERED that the Court awards Mr. Benson $1,614.-437.43 in fees and expenses for services rendered by him and his staff from 1979 through June 30, 1986; and it is further ORDERED that the Court awards Mr. Benson $72,702.49 in fees and expenses incurred in litigating his fee application; and it is further ORDERED that because Mr. Benson has previously received $347,332.93 of this award, the balance due Mr. Benson is $1,339.806.99; and it is further ORDERED that the Court awards the LDF $2,323.730.60 in fees and expenses for services rendered through May of 1985; and it is further

Date	NR.	Proceedings
		ORDERED that the Court awards the LDF $42,145.14 for fees and expenses incurred in litigation its fee application; and it is further ORDERED that the State of Missouri dfts. are solely liable for the $4,053,015.66 in fees and expenses awarded by the Court, including the $347,332.93 the State has previously paid Mr. Benson; and it is further ORDERED that the KCMSD's motion for an award of attorney's fees and expenses is DENIED; and it is further ORDERED that AFT 691's motion for an award of attorney's fees and expenses is DENIED).
5/21/87	1338	MOTION - to Alter & Amend Judgment & Findings w/sugg - plt.
6/1/87	1346	RESPONSE - of State dfts. to plts' Motion to alter and amend judgment and findings
7/14/87	1369	ORDER - ORDERED that the plts motion to amend the Court's order of 5/11/87 regarding atty's fees is granted in part & denied in part as set forth in this order; & it is further ORDERED that the Court modifies the long-range magnet order 11/12/86 to include the extended day program at North Rock Creek & Korte Elementary Schools; & it is further ORDERED that the State of Missouri's motion to strike KCMSD's

Date	NR.	Proceedings
		Suggested Findings & Conclusions relating to the 1987-88 desegragation budget is DENIED Mailed.
8/3/87	1391	NOTICE - of appeal by the State Dfts. (#38707)
8/6/87	1398	NOTICE - of Cross-Appeal by plts.
08/11/87	1402	ORDER - filed, mailed; that the Court approves the $1,200,000.00 supersedeas bond filed by the State, thereby staying execution of those portions of the May 11, 1987 and July 14, 1987 orders which awarded fees and expenses to plaintiffs' counsel Arthur Benson; and it is further ORDERED that the plaintiffs' request that the Court condidtion any stay upon the partial payment of $1,-025,078.00 by the State is denied.
1988		
4/25/88	1601	JUDGMENT - from the 8th Circuit Court of Appeals. (ORDERED that the judgment of the district court is affirmed in accordance with the opinion of this Court).

(Filed October 11, 1988)

SUPREME COURT OF THE UNITED STATES

No. 88-64

Missouri, et al.,
Petitioners

vs.

Kalima Jenkins, by her friend,
Kasau Agyei, et al.

ORDER ALLOWING CERTIORARI

Filed October 11, 1988

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted limited to Questions 1 and 4 presented by the petition.

October 11, 1988

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-64

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONERS

WILLIAM L. WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
Supreme Court Building
Jefferson City, Missouri 65102
(314) 751-3321

MICHAEL L. BOICOURT*
Assistant Attorney General
BRUCE FARMER
BART A. MATANIC
Assistant Attorneys General
Counsel for Petitioners

*Counsel of Record

E. L. MERSEREAU, INC., 918 Cherry Street, Kansas City, Mo. 64106, (816) 421-2000

QUESTIONS PRESENTED

1. Whether the Eleventh Amendment prohibits an award of attorney's fees against a State based on current hourly rates which include interest and a delay in payment factor.

2. Whether paralegal and law clerk expenses awarded under 42 U.S.C. § 1988 must be assessed at actual cost rather than market rates.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellants/cross-appellees
(now petitioners):

The State of Missouri

The Honorable John Ashcroft, Governor of the State of Missouri

The Honorable Wendell Bailey, Treasurer of the State of Missouri

Dr. Robert E. Bartman, The Commissioner of Education of the State of Missouri

The Missouri State Board of Education: Roseann Bentley, Dan L. Blackwell, Terry A. Bond, Thomas R. Davis, Susan D. Finke, Raymond F. McAllister, Jr., Cynthia B. Thompson and Roger L. Tolliver

Appellees/cross-appellants
(now respondents):

Kalima Jenkins, by her next friend, Kamau Agyei

Carolyn Dawson, by her next friend, Richard Dawson

Tufanza A. Byrd, by her next friend, Teresa Byrd

Derek A. Dydell, by his next friend, Maurice Dydell

Terrance Cason, by his next friend, Antonia Cason

Jonathan Wiggins, by his next friend, Rosemary Jacobs Love

Kirk Allan Ward, by his next friend, Mary Ward

Robert M. Hall, by his next friend, Denise Hall

Dwayne A. Turrentine, by his next friend, Shelia Turrentine

Gregory A. Pugh, by his next friend, Barbara Pugh

Cynthia Winters, by her next friend, David Winters, on behalf of themselves and all others similarly situated

Additional
Appellants/cross-appellees below:

The School District of Kansas City, Missouri, and Claude Perkins, then-superintendent

TABLE OF CONTENTS

QUESTIONS PRESENTED I
PARTIES BELOW II
TABLE OF CONTENTS IV
TABLE OF AUTHORITIES V
OPINIONS BELOW 1
JURISDICTION 1
STATUTE INVOLVED 2
CONSTITUTIONAL PROVISION 2
STATEMENT OF THE CASE 2
SUMMARY OF THE ARGUMENT 7
ARGUMENT 9

I. The Eleventh Amendment prohibits an award of prejudgment interest or compensation for delay against a State as part of reasonable attorney's fees under 42 U.S.C. § 1988 9

A. The conflicting decisions of the Courts of Appeals 9

B. Legislative waiver of the Eleventh Amendment must be unequivocal and expressed in unmistakable language 11

C. 42 U.S.C. § 1988 does not waive the States' Eleventh Amendment immunity from prejudgment interest 16

II. Reimbursing the actual cost of paralegal and law clerk services is appropriate under the facts of this case 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 24, 25
Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985) 11-12, 13, 14, 15, 18
Badaracco v. C.I.R., 464 U.S. 386 (1984) 26
Blanchard v. Bergeron, No. 87-1485 (*cert. granted* June 27, 1988) 24
Blum v. Stenson, 465 U.S. 886 (1984) 26
City of Riverside v. Rivera, 477 U.S. 561 (1986) 25
Daly v. Hill, 790 F.2d 1071 (4th Cir. 1986) 10
Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) 20, 26
Edelman v. Jordan, 415 U.S. 651 (1974) 14, 18, 23
Employees v. Missouri Public Health Department, 411 U.S. 279 (1973) 14, 22
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 12
Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) 23
Gaines v. Dougherty County Board of Education, 775 F.2d 1565 (11th Cir. 1985) 10
Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987) 21
Greenspan v. Automobile Club of Michigan, 536 F.Supp. 411 (E.D. Mich. 1982) 24
Grendel's Den, Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1984) 10
Hensley v. Eckerhart, 461 U.S. 424 (1983) 27

Hutto v. Finney, 437 U.S. 678 (1978) ..... *passim*
Jenkins v. State of Missouri, 838 F.2d 260 (8th Cir. 1988) 1, 2, 9, 10, 20
Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) 20, 26
Jordan v. Multnomah County, 815 F.2d 1258 (9th Cir. 1987) 10
Lamphere v. Brown University, 610 F.2d 46 (1st Cir. 1979) 24
Library of Congress v. Shaw, 478 U.S. 310 (1986) ..... *passim*
Lightfoot v. Walker, 826 F.2d 516 (7th Cir. 1987) 10
Murray v. Wilson Distilling Co., 213 U.S. 151 (1909) 14
Parden v. Terminal Railway of Ala. Docks Dept., 377 U.S. 184 (1964) 14
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 15, 18, 22
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) 12, 13, 15, 18
Poleto v. Consolidated Rail Corporation, 826 F.2d 1270 (3rd Cir. 1987) 21
Quern v. Jordan, 440 U.S. 332 (1979) 14, 18
Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) 10, 24
Roe v. City of Chicago, 586 F.Supp. 513 (N.D. Ill. 1984) 24
Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987) 9, 11, 18, 21, 22
Ross v. Saltmarsh, 521 F.Supp. 753 (S.D. N.Y. 1981), *aff'd*, 688 F.2d 816 (2nd Cir. 1982) 24
Sisco v. J.S. Alberici Construction Co., 733 F.2d 55 (8th Cir. 1984) 10

62 Cases of Jam v. United States, 340 U.S. 593 (1951) 25
Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974) 20
Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D. N.C. 1975) 20
Thompson v. Kennickell, 836 F.2d 616 (D.C. Cir. 1988) 21
TVA v. Hill, 437 U.S. 153 (1978) 26
United States v. Deluxe Cleaners and Laundry, Inc., 511 F.2d 926 (4th Cir. 1975) 26
United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947) 24
Utah International, Inc. v. Department of Interior, 643 F.Supp. 810 (D. Utah 1986) 21
Welch v. Texas Department of Highways and Public Transportation, ... U.S. ....., 107 S.Ct. 2941 (1987) 13, 14, 18

Constitutional Provisions:

Eleventh Amendment ..... *passim*

Statutes:

28 U.S.C. § 1920 19
28 U.S.C. § 2411 18
28 U.S.C. § 2412(d)(2)(A) 17
28 U.S.C. § 2516 18
28 U.S.C. § 2674 18
42 U.S.C. § 1983 14
42 U.S.C. § 1988 ..... *passim*
Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C. § 2000(e-5)k (Title VII) 16

Legislative Materials:

S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad.News 5908 ....17, 18, 20, 26

Other:

C. McCormick, Damages § 50, p. 205 (1935) 19

10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §§ 2666, 2670 (2d ed. 1983) 19

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 838 F.2d 260 (8th Cir. 1988) and is reprinted in Petitioners' Petition for Writ of Certiorari in the Appendix at page A-1.

The May 11, 1987 opinion of the United States District Court for the Western District of Missouri is unreported but is reprinted in Petitioners' Petition for Writ of Certiorari in the Appendix at page A-22. The July 14, 1987 opinion of the United States District Court for the Western District of Missouri is unreported but is reprinted in Petitioners' Petition for Writ of Certiorari in the Appendix at page A-44.

JURISDICTION

On January 29, 1988, the United States Court of Appeals for the Eighth Circuit issued its order affirming the District Court's judgment awarding attorney's fees and expenses. On April 13, 1988, the United States Court of Appeals for the Eighth Circuit issued its order denying Petitioners' Motion for Rehearing *En Banc*.

A Petition for Writ of Certiorari was filed by Petitioners herein on July 5, 1988. Pursuant to 28 U.S.C. § 2101(c), the Petition was timely filed. Certiorari was granted on October 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

In relevant part, 42 U.S.C. § 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

CONSTITUTIONAL PROVISION

The relevant constitutional provision involved in this case is the Eleventh Amendment which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

This case is the fee tail of the desegregation litigation involving Kansas City, Missouri.[1] This Court has granted

---

1. The Kansas City, Missouri desegregation litigation has resulted in numerous published opinions. *Jenkins v. State of Missouri*, 838 F.2d 260 (8th Cir. 1988), is the only published fee decision. For information concerning the history of the underlying litigation, the Court is referred to the following decisions: *In re Jackson County, Missouri*, 834 F.2d 150 (8th Cir. 1987); *Jenkins v. State of Missouri*, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, 108 S.Ct. 70 (1987); *School District of Kan-*

(Continued on following page)

certiorari on two issues concerning the fee awards. One, whether the States' Eleventh Amendment immunity precludes a fee award based on current hourly rates which include prejudgment interest or a delay in payment factor. Two, whether 42 U.S.C. § 1988 allows reimbursement for paralegal and law clerk services at market rates rather than actual cost.

The plaintiff/schoolchildren were represented throughout most of this litigation by two groups of attorneys—Arthur A. Benson II and his staff and the NAACP Legal Defense Fund, Inc. (LDF). While this case was originally filed on May 26, 1977 (J.A. 2), the attorneys awarded fees did not enter the case until later. Benson entered his appearance on behalf of the plaintiffs on March 15, 1979 (J.A. 2). The LDF entered an appearance in the case on May 27, 1982 (J.A. 2).

The liability litigation took a number of years. The liability trial began on October 31, 1983 (J.A. 3). After ninety-two trial days, the liability trial ended on June 13, 1984 (J.A. 3-9). On September 17, 1984, the plaintiff/schoolchildren became prevailing parties when the district court issued its judgment finding the State defendants (Petitioners herein) and the Kansas City, Missouri School District (KCMSD) liable (J.A. 10) (Pet.App. A171-A215).

Footnote continued—

sas City, Missouri v. State of Missouri, 592 F.2d 493 (8th Cir. 1979); *Jenkins v. State of Missouri*, 672 F.Supp. 400 (W.D. Mo. 1987); *Jenkins v. State of Missouri*, 639 F.Supp. 19 (W.D. Mo. 1985); *Jenkins v. State of Missouri*, 593 F.Supp. 1485 (W.D. Mo. 1984); *Black v. State of Missouri*, 492 F.Supp. 848 (W.D. Mo. 1980); *School District of Kansas City, Missouri v. State of Missouri*, 460 F.Supp. 421 (W.D. Mo. 1978); *School District of Kansas City, Missouri v. State of Missouri*, 438 F.Supp. 830 (W.D. Mo. 1977).

Seventeen months later, on February 5, 1986, the attorneys filed their initial motion for attorney's fees and expenses (J.A. 12). Subsequent motions were filed (J.A. 13) and the fees at issue in the instant case involve the time period through June 30, 1986 (Pet.App. A9). This includes the litigation in the remedial phase of the case as well as the first year of monitoring the desegregation plan. The vast majority of the hours compensated, however, was for the period 1981-1984 when the liability phase of the case was litigated.

The fee issues were extensively briefed by all parties and a one-day hearing was held on February 27, 1987 (J.A. 16). On May 11, 1987, the district court issued its order (J.A. 16) (Pet.App. A22). As modified on July 14, 1987 (Pet.App. A44), the district court awarded fees and expenses totalling $4,094,443.66, with Benson awarded $1,728,567.92 and LDF $2,365,875.74 (J.A. 16-17) (Pet.App. A9).[2]

The district court awarded Benson an hourly rate of $200 per hour (Pet.App. A26-A27). The district court determined that reasonable hourly rates for attorneys with litigation experience and expertise comparable to Benson range from $125 to $175 per hour and Benson "would fall at the higher end of this range" (Pet.App. A26). This finding was based on 1986 rates and stands

2. While the fee litigation has been pending, the State has made partial payments to both Benson and the LDF. Of the $1,728,567.92 awarded to Benson, Petitioners have made periodic payments totalling $1,147,332.93 (2/26/86—$200,000; 6/2/86—$100,000; 10/1/86—$47,332.93; 8/3/87—$300,000; 4/29/88—$500,000). Of the $2,365,875.74 awarded to the LDF, Petitioners have paid $1,350,000 (5/29/87—$850,000; 5/2/88—$500,000).

in contrast to Benson's statement that his current billing rate was $125 per hour.[3]

The district court enhanced Benson's rate to $200 per hour, in part, because of preclusion of other employment and undesirability of the case (Pet.App. A26). The court further found it was "essential that [Benson's] hourly rate include compensation for the delay in payment." (Pet.App. A26). The district court did not indicate what portion of the enhancement was due to delay in payment.

For Benson's staff, the district court awarded current hourly rates. The court noted that for the years the services were rendered (1982-1984) the average hourly rate for the two main associates was $60 to $65 per hour (Pet.App. A28). The court, however, awarded $80 per hour finding the "differential . . . necessary to compensate Mr. Benson for the delay in payment" (Pet.App. A28-A29).

Concerning the LDF, the district court awarded fees at "current, rather than historical, rates" to compensate for delay in payment (Pet.App. A33). The court did not consider preclusion of other employment or undesirability of the case in enhancing the hourly rate for any attorney other than Benson.

There were a substantial number of nonattorneys assisting the plaintiffs in this case. These were characterized as paralegals, law clerks or recent law graduates. These labels are irrelevant to the issues in this case and

3. See Motion for Partial Award of Attorneys' Fees and Expenses, filed February 5, 1986, p. 10 (Record on Appeal 293, 303).

Petitioners will refer to all nonattorney paraprofessionals as "paralegals."

The district court awarded current market rates for paralegal services.[4] The court emphasized that it was compensating for "delay in payment by calculating this award based upon the current, rather than historical hourly rates" (Pet.App. A30, A34).

Evidence was presented at the February 27, 1987 fee hearing concerning the actual costs of paralegal services. LDF indicated that paralegal salaries ranged from $18,000 to $24,000 annually, which is approximately $8.50 to $11.50 per hour (Transcript of February 27, 1987 hearing, p. 54). Benson testified that most, if not all, of the paralegals were hired specifically to work on this case and the average hourly salary was $7 per hour (Tr. pp. 125-126).[5] Considering benefits and other overhead associated with paralegal employees, Petitioners suggested that $15 per hour closely approximated the actual costs of the paralegals hired to work on this case (Pet. App. A15).

The Court of Appeals for the Eighth Circuit affirmed the district courts' orders in all respects. Pertinent to the issues involved herein, the Eighth Circuit found that the use of current market rates to compensate for delay in payment was not prohibited by the Eleventh Amendment (Pet.App. A13-A15). The court recognized that paralegal reimbursement has been treated in various ways

---

4. The district court awarded $40 per hour for paralegals, $35 per hour for law clerks and $50 per hour for recent law graduates (Pet.App. A29, A34).

5. It is interesting to note that Benson's expert witness, Kansas City attorney Max Foust, testified that he did not bill separately for paralegal services (Tr. pp. 73-74).

by the courts (Pet.App. A15), but found that the district courts use of market rates was not clearly erroneous (Pet.App. A15-A16).

SUMMARY OF THE ARGUMENT

The controlling principle is that an increase in a fee award to compensate for delay in payment is equivalent to an award of interest. This Court's *Library of Congress* decision analyzed this general rule under the fee-shifting provision of Title VII. This Court held that the federal government's waiver of immunity from suit did not also waive the sovereign's immunity from liability for interest on fee awards.

The question is then whether the same express waiver of immunity from liability for interest or delay required for the United States is also required for the States' under the Eleventh Amendment. This Court has required that Congress must express an unequivocal intention to waive the States' Eleventh Amendment immunity in unmistakable language in the statute itself. This standard is virtually identical and intellectually indistinguishable from the degree of congressional clarity required to find a waiver of the federal government's sovereign immunity.

Thus, under 42 U.S.C. § 1988, the States' Eleventh Amendment immunity from interest on fee awards has not been abrogated by Congress. The language of 42 U.S.C. § 1988 does not deal with this issue and the legislative history is silent. While § 1988 does allow "attorney's fees as part of costs", *Library of Congress v. Shaw* clearly holds that these terms do not include interest or compensation for delay.

The other issue involved in this case concerns the proper method of reimbursing paralegal and law clerk services. Again, there is no indication in either § 1988 or the legislative history addressing this issue. Congress did express its intention that § 1988 not result in a "windfall" for attorneys. Permitting reimbursement of paralegal services at market rates would result in a substantial profit to attorneys over and above the actual cost of such employees. There is no indication that Congress intended the attorneys for prevailing parties to receive a substantial profit on paralegal expense from the losing party.

Reimbursement of paralegal expense at actual cost is particularly appropriate in the instant case. The dozens of paralegals and law clerks employed by the attorneys for the plaintiff/schoolchildren were hired specifically for this case. Under such circumstances, reimbursement at actual cost is equitable to all parties and does not run contrary to Congress' intent that attorneys not receive a "windfall" under § 1988.

ARGUMENT

I. The Eleventh Amendment prohibits an award of prejudgment interest or compensation for delay against a State as part of reasonable attorney's fees under 42 U.S.C. § 1988.

In *Library of Congress v. Shaw,* 478 U.S. 310 (1986), this Court held that the federal government's traditional sovereign immunity prohibited an award of interest or compensation for delay as part of reasonable attorney's fees under Title VII. The question in the instant case is whether the States' Eleventh Amendment immunity prohibits an award of prejudgment interest or compensation for delay as part of reasonable attorney's fees under 42 U.S.C. § 1988.

A. The conflicting decisions of the Courts of Appeals.

This issue has resulted in two conflicting decisions in the appellate courts. In the instant case, the Court of Appeals for the Eighth Circuit held that compensation for delay in payment is not prohibited by the Eleventh Amendment. *Jenkins v. State of Missouri,* 838 F.2d 260, 266 (8th Cir. 1988). This conflicts with a prior decision by the Court of Appeals for the First Circuit which held that prejudgment interest on fee awards or compensation for delay is prohibited by the Eleventh Amendment. *Rogers v. Okin,* 821 F.2d 22, 28 (1st Cir. 1987). In reaching opposite conclusions, the two courts disagreed on the applicability of *Library of Congress v. Shaw.*

In *Jenkins*, the Eighth Circuit declined "to extend *Shaw* to the body of Eleventh Amendment law, which was not covered by [*Shaw's*] rationale." 838 F.2d at 265. The Eighth Circuit assumed, without discussion, that the rule of statutory interpretation applicable in suits against the federal government was inapplicable in an Eleventh Amendment analysis. *Id.* The Eighth Circuit also refused to equate prejudgment interest with compensation for delay. Finally, the Eighth Circuit emphasized that "courts have regularly interpreted § 1988 to permit compensation for delay in the payment of fees." *Id.*[6]

In contrast, the First Circuit analyzed the issue in light of *Library of Congress v. Shaw* and the legislative history of 42 U.S.C. § 1988. In addition, unlike the Eighth Circuit, the First Circuit discussed the critical issue of Congress' intent. The First Circuit noted the holding in *Hutto v. Finney*, 437 U.S. 678 (1978), that § 1988 abrogated Eleventh Amendment immunity for attorney's fees, but emphasized this Court's *Library of Congress v. Shaw* decision that prejudgment interest is not considered a component of attorney's fees or costs.

6. The cases cited by the Eighth Circuit in support of this proposition are inapposite, either because a State was not involved, or the Eleventh Amendment issue was not raised. See *Lightfoot v. Walker*, 826 F.2d 516 (7th Cir. 1987) (State involved; no discussion of Eleventh Amendment issue); *Jordan v. Multnomah County*, 815 F.2d 1258 (9th Cir. 1987) (State not involved); *Daly v. Hill*, 790 F.2d 1071 (4th Cir. 1986) (county involved, not State); *Gaines v. Dougherty County Board of Education*, 775 F.2d 1565 (11th Cir. 1985) (State not involved); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) (State involved; no discussion of Eleventh Amendment issue); *Sisco v. J.S. Alberici Construction Co.*, 733 F.2d 55 (8th Cir. 1984) (State not involved; private defendant); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (State involved; no discussion of Eleventh Amendment).

Rogers v. Okin, 821 F.2d at 27. Reviewing the legislative history of § 1988, the First Circuit correctly noted Congress' silence on whether an attorney's fee award should include prejudgment interest. Because "neither the statutory language nor the legislative history" contained a clear indication of Congress' intent, the First Circuit refused to "infer" a waiver of the States' Eleventh Amendment immunity from "substantial sums of prejudgment interest on attorney's fee awards." *Id.* at 27-28.

As discussed below, the First Circuit's analysis is consistent with the rationale set forth by this Court in *Library of Congress v. Shaw*. More importantly, the First Circuit's decision is a faithful adherence to the rigorous standards established by this Court in numerous cases addressing congressional waivers of the States' Eleventh Amendment immunity.

B. Legislative waiver of the Eleventh Amendment must be unequivocal and expressed in unmistakable language.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Court has repeatedly emphasized the significance of this Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III" of the Constitution. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238

(1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (*Pennhurst II*).

The similarity between the States' Eleventh Amendment immunity and the federal government's sovereign immunity is inescapable; both protect the sovereign from liability. In *Library of Congress v. Shaw*, this Court noted that waivers of immunity must be construed "strictly in favor of the sovereign" and cautioned that the waiver not be enlarged beyond what the language requires. 478 U.S. at 318. The court emphasized that a waiver requires an "*affirmative* congressional choice." *Id.* at 319 (emphasis added).

The language used by this Court in Eleventh Amendment waiver cases is virtually identical to the rigorous standard articulated in *Library of Congress v. Shaw*. In deciding whether Congress has abrogated the Eleventh Amendment immunity, this Court has required a clear expression of legislative intent. In *Atascadero*, this Court emphasized the "well-established" requirement that "Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." 473 U.S. at 242.

While this Court has recognized that the Eleventh Amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), this Court has nonetheless required "that Congress must express its intention to abrogate the Eleventh Amendment in *unmistakable* language *in the statute itself*." *Atascadero*, 473 U.S. at 243 (emphasis added).

Petitioners recognize that *Hutto v. Finney*, 437 U.S. 678 (1978), held that the Eleventh Amendment did not prevent an award of attorney's fees payable by the States

when their officials are sued in their official capacities under § 1988, notwithstanding the fact that the statute does not contain an express statutory waiver of the States' immunity. Some may suggest, therefore, that the degree of congressional clarity required to abrogate the Eleventh Amendment immunity under § 1988 is less than that required to waive the federal government's sovereign immunity as discussed in *Library of Congress v. Shaw*.

The analysis employed in *Hutto v. Finney*, however, has been ignored by this Court in more recent decisions regarding the standard for congressional waivers of the Eleventh Amendment. For example, *Atascadero* repeatedly emphasizes the requirement of "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the sovereign states' ". 473 U.S. at 240, citing *Pennhurst II*, 465 U.S. at 99. See also *Atascadero*, 473 U.S. at 242 ("Congress unequivocally express its intention"); at 243 ("incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment"); *id.* ("the requirement that Congress unequivocally express this intention in the statutory language ensures such certainty"); *id.* ("it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power"); *id.* ("Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself").[7]

---

7. See also *Welch v. Texas Department of Highways and Public Transportation*, ___ U.S. ___, 107 S.Ct. 2941, 2948 (1987) ("the Court consistently has required an unequivocal expres-

(Continued on following page)

Atascadero is a reaffirmation of this Court's consistent holdings on Eleventh Amendment waiver issues. For example, in *Employees v. Missouri Public Health Department,* 411 U.S. 279 (1973), this Court concluded that Congress did not lift the sovereign immunity of the States by enacting the Fair Labor Standards Act of 1938. This Court emphasized the absence of any indication "by clear language that the congressional immunity was swept away." 411 U.S. at 285. In *Edelman v. Jordan,* 415 U.S. 651 (1974), this Court acknowledged a State may waive its immunity but such a waiver can be found "only where stated 'by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" 415 U.S. at 673, quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909).

In *Quern v. Jordan,* 440 U.S. 332 (1979), this Court held that 42 U.S.C. § 1983 does not override the States' Eleventh Amendment immunity. This Court further noted that "general language" used by Congress is not sufficient to "overturn the constitutionally guaranteed immunity of the sovereign states." 440 U.S. at 342 (footnote omitted).

Footnote continued—

sion that Congress intended to override Eleventh Amendment immunity"). In *Welch,* the Court held that Congress had not abrogated the States' Eleventh Amendment immunity under the Jones Act. 107 S.Ct. at 2947. In so doing, the Court expressly overruled *Parden v. Terminal Railway of Ala. Docks Dept.,* 377 U.S. 184 (1964), which did not require waiver by "unmistakably clear language." *Id.* at 2948 (Per Justice Powell, with three Justices concurring, and one Justice concurring in the judgment). The repudiated *Parden* analysis is similar to the analysis in *Hutto v. Finney.*

The Eighth Circuit implies that the standard is more lenient when reviewing legislation enacted pursuant to § 5 of the Fourteenth Amendment. The *Atascadero* and *Pennhurst* cases, however, analyze the Eleventh Amendment in terms of Congress' enforcement powers under the Fourteenth Amendment. In *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981) (*Pennhurst I*), this Court emphasized that "such legislation imposes congressional policy on a State involuntarily and . . . we should not quickly attribute to Congress an unstated intent . . ." 451 U.S. at 16. *Pennhurst II* reemphasized the requirement of "an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the sovereign states." 465 U.S. at 99.

Pennhurst II also acknowledges the "vital role of the doctrine of sovereign immunity in our federal system." *Id. Atascadero* expanded on this concept noting that in determining whether Congress has abrogated the Eleventh Amendment immunity, "the courts themselves must decide whether their own jurisdiction has been expanded." 473 U.S. at 243. This Court emphasized that "it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power." *Id.*

Thus, this Court has established rigorous guidelines for finding a congressional abrogation of a sovereign's immunity. These strict standards apply when analyzing both the federal government's sovereign immunity or the States' Eleventh Amendment immunity. Neither 42 U.S.C. § 1988, nor its legislative history, contains the unmistakable language necessary to find an unequivocal expression of Congress' intent.

C. 42 U.S.C. § 1988 does not waive the States' Eleventh Amendment immunity from prejudgment interest.

It is undisputed that 42 U.S.C. § 1988 does not contain any language "in the statute itself" addressing Eleventh Amendment immunity. In pertinent part, § 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Neither does the language of § 1988 explicitly address the issue of prejudgment interest or compensation for delay. The question remains whether the language actually used in the statute includes such compensation by implication.

Again, *Library of Congress v. Shaw* provides unmistakable guidance on this issue. There, this Court was considering whether the Civil Rights Act of 1964, § 706(k), as amended, 42 U.S.C. § 2000(e-5)k (Title VII), waived the federal government's immunity from interest. 478 U.S. at 313. That statute provides in relevant part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [EEOC] or the United States, *a reasonable attorney's fee as part of the costs*, and the [EEOC] and 'the United States shall be liable *for costs the same as a private person.*'

Emphasis added. This statute contains the language identical to the relevant portion of 42 U.S.C. § 1988. In fact, the legislative history of § 1988 notes its reliance of the "language of Title[] . . . VII of the Civil Rights Act of 1964." S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 Code Cong. & Ad.News 5908, 5910.

The phrase "reasonable attorney's fee as part of costs" is found in both statutes. *Library of Congress v. Shaw* expressly held that the phrase "reasonable attorney's fee" did not waive the federal government's sovereign immunity from interest. 478 U.S. at 320. This Court further held that the term "costs" did not waive the federal government's sovereign immunity from interest. *Id.* at 321.[8]

If *Library of Congress v. Shaw* is applied consistently, then the identical language used in 42 U.S.C. § 1988 also does not evidence Congress' intent to waive the States' Eleventh Amendment immunity for prejudgment interest or compensation for delay. It would be anomalous to suggest that Congress intended a waiver of immunity under § 1988 by use of the phrases "reasonable attorney's fee" and "costs" and did not intend such a waiver when using the identical phrases in Title VII.

Petitioners' position is supported by congressional action in another fee-shifting statute. The 1985 amendments to the Equal Access to Justice Act (EAJA) explicitly permit adjustments to compensate attorneys for "increase[s] in the cost of living." 28 U.S.C. § 2412(d)(2)(A). Thus, when Congress has intended to increase fee awards to

---

8. *Library of Congress v. Shaw* further held that the phrase "the United States shall be liable for costs the same as a private person" did not evidence the "requisite affirmative congressional choice" to waive sovereign immunity. 478 U.S. at 319.

compensate for delay, it has done so expressly in the language of the statute.[9]

The First Circuit correctly noted that the "legislative history . . . is completely silent on the subject of prejudgment interest." *Rogers v. Okin*, 821 F.2d at 22. The Senate Report does state that "citizens must have the opportunity to recover what it costs them to vindicate [their civil rights] in court." See S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910. *Hutto v. Finney* also suggests that "Congress [may] amend its definition of taxable costs and have the amended class of costs applied to the States . . . without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity." 437 U.S. at 696.[10]

This Court, however, has emphasized that prejudgment interest, compensation for delay, or whatever term

---

9. Similarly, when Congress has intended to waive the United States' immunity from interest, it has done so in express language. See, e.g., 28 U.S.C. § 2411 (expressly authorizing pre- and post-judgment interest payable by the United States in tax refund cases). Congress has also reiterated the general rule that interest cannot be allowed absent express waiver. See 28 U.S.C. § 2516 ("Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof"); 28 U.S.C. § 2674 ("The United States . . . shall not be liable for interest prior to judgment" under the Federal Torts Claim Act).

10. In light of subsequent decisions by this Court, particularly *Atascadero*, a reasonable argument could be made that the apparently more lenient standard set forth in *Hutto v. Finney* is no longer valid. Because *Hutto v. Finney* appears to have been superseded in this Court's subsequent Eleventh Amendment waiver decisions, its scope should not be expanded. To hold that § 1988 implicitly allows recovery of prejudgment interest or compensation for delay in payment would cast doubt on the Eleventh Amendment analysis set forth in *Atascadero*, *Quern*, *Edelman*, *Pennhurst I*, *Pennhurst II*, and *Welch*.

used to describe compensation for the time value of money is not a component of "costs." "Costs" is a term of specific and narrow content; in federal adjudication, the word "costs" has never been understood to include any interest component. 28 U.S.C. § 1920. See also 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §§ 2666, 2670 (2d ed. 1983). Historically, prejudgment interest has been viewed as an element of damages, not as a component of "costs." *Id.* § 2664, at 159-60.

In *Library of Congress v. Shaw*, this Court reiterated that "prejudgment interest is considered as damages, not a component of 'costs' . . . A statute allowing costs, and within that category, attorney's fees, does not provide the clear affirmative intent of Congress to waive the sovereign's immunity." 478 U.S. at 321. Therefore, this Court emphasized that the "requirement of a *separate* waiver reflects the historical view that interest is an element of damages separate from the damages on the substantive claim." *Id.* at 314 (emphasis added), citing C. McCormick, Damages § 50, p. 205 (1935).

Hutto v. Finney actually supports, rather than disputes, petitioners' position on this issue. There, this Court indicated that "it would be absurd to require an express reference to State litigants whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs." 437 U.S. at 696-97. In a footnote, however, this Court indicated that the analysis might be different "if Congress were to expand the concept of costs beyond the traditional category of litigation expenses." 437 U.S. at 697, note 27. Because prejudgment interest or compensation for delay is not a traditional component of costs, but rather considered as dam-

ages, a clear affirmative indication from Congress is necessary to waive immunity therefrom.

The legislative history of § 1988, however, contains no indication that Congress intended to expand the traditional components of costs to include prejudgment interest. The legislative history identifies four cases as reflecting the appropriate standards for calculating fee awards. See S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad.News 5908, 5913. None of the four cases, however, addressed the issue of prejudgment interest or compensation for delay.[11]

The Eighth Circuit attempted to avoid the holding of *Library of Congress v. Shaw* by refusing to equate interest with compensation for delay. *Jenkins*, 838 F.2d at 265. The court approved the district court's consideration of "delay as one factor in setting the hourly fee." *Id.* In *Library of Congress v. Shaw*, however, this Court cautioned that "the no-interest rule cannot be avoided simply by devising a new name for an old institution." 478 U.S. at 321. There, the respondent argued that interest and a delay factor had distinct purposes. *Id.* at 322. This Court rejected that argument noting that interest and a delay factor share an identical function, both "designed to compensate for the belated receipt of money." *Id.*

---

11. See *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974) (sets forth twelve factors to consider in determining fee awards, not one of which expressly or implicitly deals with prejudgment interest); *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) (follows modified *Johnson* approach, no discussion of interest); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D. N.C. 1975) (no discussion of interest); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974) (no discussion of interest).

The compensation for delay is intellectually indistinguishable from prejudgment interest; both function to compensate the attorney for the delayed receipt of fees. The First Circuit analysis of this issue is consistent with the standards this Court clearly articulated in *Library of Congress v. Shaw*. See *Rogers v. Okin*, 821 F.2d at 26.

The lower courts have consistently applied *Library of Congress v. Shaw* to prohibit interest on fee awards against the federal government whether it be called prejudgment interest, compensation for delay or compensation at current billing rates. See, e.g., *Thompson v. Kennickell*, 836 F.2d 616, 619 (D.C. Cir. 1988) ("*Shaw* precludes . . . use of current billing rates for work performed under the Equal Pay Act"); *Greater Los Angeles Council on Deafness v. Community Television of Southern California*, 813 F.2d 217 (9th Cir. 1987) (Rehabilitation Act case - *Shaw* "prohibit[s] the use of a multiplier to enhance fee awards because of delay in payment"); *Utah International, Inc. v. Department of Interior*, 643 F.Supp. 810, 830 (D. Utah 1986) ("compensation for delay is the equivalent of interest").[12]

The cases discussed in Part I B, *supra*, hold that an unequivocal expression of Congress' intent is required to override the States' Eleventh Amendment immunity. *Hutto v. Finney* recognizes that the "reasons for requiring a formal indication of Congress' intent . . . insures that Congress has not imposed 'enormous fiscal burdens on

---

12. While not citing *Library of Congress v. Shaw*, the Court of Appeals for the Third Circuit has held that prejudgment interest could not be awarded under FELA. *Poleto v. Consolidated Rail Corporation*, 826 F.2d 1270, 1279 (3rd Cir. 1987). While the court recognized strong policy considerations in favor of such an award, it noted the decision was for Congress to make. *Id.* at 1274-79.

the States' without careful thought." 437 U.S. at 697, note 27, citing *Employees v. Missouri Public Health Department*, 411 U.S. 279, 284 (1973). Since *Hutto v. Finney*, the Court has reemphasized that "[t]he case for inferring intent is at its weakest where . . . the rights asserted impose *affirmative* obligations on the States . . ., since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16-17 (1981) (emphasis in the original) (*Pennhurst I*).

As demonstrated above, the terms used in § 1988—reasonable attorney's fees and costs—do not include the concept of prejudgment interest or compensation for delay. Therefore, there is certainly no unequivocal evidence of Congress' intent to impose what could be a substantial obligation on the States. Undeniably, prejudgment interest can result in a substantial financial obligation. In *Rogers v. Okin, supra*, the First Circuit's recalculation based on historical rates resulted in a total reduction of about 40%, or approximately $600,000 of a $1.47 million fee award. In the case at bar, similar reductions are anticipated although the exact calculations would be determined on remand.[13]

---

13. The use of current rates in the case at bar inflated the fee award more than usual. The plaintiff/schoolchildren became prevailing parties on September 17, 1984 when the district court issued its liability orders (Pet.App. A171). The initial motion for attorney's fees was not filed until seventeen months later on February 5, 1986 (J.A. 12) and 1986 hourly rates were requested. Had the motion been filed in 1984, the hourly rates requested presumably would have been based on 1984 rates. Because the vast majority of the hours compensated were spent on the discovery and liability phase of the litigation, the attorneys were, in effect, rewarded for delaying the fee application.

The use of current market rates to compensate for delay in payment is in effect an award of prejudgment interest. It thus becomes a retroactive award of damages, which is clearly prohibited by the Eleventh Amendment. *Edelman v. Jordan* held that a federal court's remedial power, consistent with the Eleventh Amendment, is limited to prospective injunctive relief and may not include a retroactive award requiring payment of damages from the state treasury. 415 U.S. at 677.

Thus, the Eleventh Amendment is a limitation on the type of relief a party may receive from a State. See *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982) ("[Eleventh] Amendment places a limit on the relief that may be obtained by the plaintiff"). While under *Hutto v. Finney*, § 1988 allows for recovery of attorney's fees and costs, the Eleventh Amendment still protects the States from a separate assessment of prejudgment interest.

There may be reasonable policy reasons to compensate civil rights attorneys for the time value of money on fee awards. The vindication of constitutional rights is a legitimate goal of Congress and obviously, the more money lawyers make on civil rights cases, the more civil rights cases will be litigated. In § 1988, however, Congress clearly indicated that other factors had been considered and specifically cautioned that § 1988 should not produce a windfall for attorneys.

Policy arguments, however, should be addressed to Congress. In *Library of Congress v. Shaw*, this Court emphasized that "policy, no matter how compelling, is insufficient, standing alone, to waive . . . immunity." 478 U.S. at 321. See also *United States v. N.Y. Rayon Im-*

porting Co., 329 U.S. 654, 662 (1947), (Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy).

II. Reimbursing the actual cost of paralegal and law clerk services is appropriate under the facts of this case.

At the current time, there are at least three different approaches to the problem of compensating paralegal services.[14] Some courts consider paralegal services a part of normal office overhead and completely deny separate reimbursement. See, e.g. *Roe v. City of Chicago*, 586 F.Supp. 513, 516 (N.D. Ill. 1984). Others reimburse the actual costs of such services. See *Lamphere v. Brown University*, 610 F.2d 46, 48 (1st Cir. 1979) (reimbursement at actual cost when paralegals hired specifically for purpose of a certain litigation, as in the instant case). See also *Greenspan v. Automobile Club of Michigan*, 536 F.Supp. 411, 415 (E.D. Mich. 1982); *Ross v. Saltmarsh*, 521 F.Supp. 753 (S.D. N.Y. 1981), *aff'd*, 688 F.2d 816 (2nd Cir. 1982). Other courts have reimbursed at market rates. See, e.g. *Ramos v. Lamm*, 713 F.2d 546, 558-59 (10th Cir. 1983). While the policies behind each of these methods differ, one thing is clear from the confusion between the lower courts—Congress has not clearly stated its intention on this issue. Given such uncertainty, this Court should not imply what could be a substantial financial obligation on the States.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court held that absent

14. A similar issue concerning compensation for paralegal expense is currently before this Court in *Blanchard v. Bergeron*, No. 87-1485 (*cert. granted* June 27, 1988).

Congressional authorization, courts lack the inherent power to award attorney's fees to prevailing litigants. As this Court stated, Congress has not "extended any roving authority to the judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Alyeska*, 421 U.S. at 260. Congress enacted 42 U.S.C. § 1988 as a reaction to *Alyeska*. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986). However, the statute only modified the *Alyeska* decision for the matters specified within it, i.e., allowing a reasonable attorney's fee as a part of costs. There is no indication whatsoever in the statute that prevailing litigants are entitled to a reasonable paralegal fee as part of their costs. Therefore, *Alyeska* controls the result of this case with regard to paralegal fees, and the judgment should be reversed and the case remanded. If federal courts do not have any power to award attorney's fees without Congressional authorization, they surely do not have the power to award paralegal fees at market rates without Congressional authorization.[15]

The Petitioners' approach to this issue is also supported by the ordinary rules of statutory construction. In construing a statute, the Supreme Court construes what Congress has written and does not add, subtract, delete or distort the words used. *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). The Fourth Circuit has stated

15. A persuasive argument could be made that paralegal fees should be included in the attorney's reasonable hourly rate as numerous cases have done. In the instant case, however, the State has taken the position that the actual cost method be used. Because the paralegals were employed specifically for this litigation, the State believes the actual cost method is an equitable resolution of this issue.

> [W]e do not think it permissible to construe a statute on the basis of a mere surmise as to what the legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated.

United States v. Deluxe Cleaners and Laundry, Inc., 511 F.2d 926, 929 (4th Cir. 1975). Additionally, "[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. C.I.R.*, 464 U.S. 386, 398 (1984); *TVA v. Hill*, 437 U.S. 153, 194-95 (1978). Therefore, as there is no discussion of paralegal fees in the statute, market rates should not be awarded against the State.

Further, reimbursing paralegal services at market rates would produce a windfall to attorneys as these market rates have a built in profit factor within them. As the legislative history indicates, § 1988 was never intended to produce windfalls to attorneys. See S.Rep. No. 94-1011, 94th Cong., 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News, 5908, 5913 (cited in *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984)). The legislative history is also silent on whether paralegal and law clerk fees are to be awarded and at what rates.[16] Since Congress has not spoken on this issue, there is no clear indication of Congressional intent and this Court should not rewrite § 1988 to serve any policy purpose.

---

16. Only one case cited in the legislative history included any reference to paralegal reimbursement. In *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974), paralegals and law clerks were awarded rates of $10 per hour. The Senate Report, however, cites the case only for its correct applicaton of the *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), factors, none of which deal with law clerk and paralegal fees.

The acceptance of the State's position that paralegal expenses should only be awarded at actual costs would also make those costs easier to calculate. The attorney requesting paralegal costs would simply reveal through financial records how much the paralegals were generally paid per hour, including benefits. This would avoid unnecessary litigation over this issue. *Cf., Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (fee request should not result in a second major litigation).

In the instant case, the use of market rates results in a huge profit to the attorneys. The record reflects that the average salary range for the paralegals was between $7 and $11 per hour. For easy calculation, the State suggested that $15 per hour closely approximated the actual costs of such employees when benefits and other overhead are considered. Reimbursing these hours at $35, $40 or $50 per hour results in an unjustified windfall. These paralegals were hired specifically for this case and are an *expense* incurred.

Therefore, reimbursement at actual cost is the appropriate method for compensation. This takes into account the various interests indicated by Congress. Prevailing plaintiffs receive the reasonable costs of such services and the attorneys do not receive a windfall at the expense of Missouri taxpayers.

CONCLUSION

This case is a straightforward application of the principles discussed in *Library of Congress v. Shaw*. Congressional abrogation of immunity must be clearly expressed. In the Eleventh Amendment context, *Atascadero* requires an unequivocal expression of intent in unmistakable language that the States' Eleventh Amendment immunity has been waived. The reasoning of the court below is erroneous because it does not defer to the rigorous standards required for waivers of immunity.

42 U.S.C. § 1988 does not address, either explicitly or by implication, compensation for delay or prejudgment interest on fee awards. Under such circumstances, the Eleventh Amendment retains sufficient vitality to prohibit the assessment of this separate, retroactive financial obligation on the States.

Further, under the factual circumstances of this case, paralegal services should be reimbursed at actual costs. The paralegals were hired specifically to assist in the prosecution of this case. Reimbursement at actual costs results in fair compensation, but does not provide a windfall at taxpayer expense.

Accordingly, for all the above reasons, Petitioners pray this honorable Court to reverse the decision of the court of appeals and to remand this case for a redetermination of the attorney's fees award. On remand, the district court would determine the historical hourly rates to be used in calculating the lodestar. The court would also

recalculate the award for paralegal services based on actual costs.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
Supreme Court Building
Jefferson City, Missouri 65102
(314) 751-3321

MICHAEL L. BOICOURT*
Assistant Attorney General
BRUCE FARMER
BART A. MATANIC
Assistant Attorneys General
Counsel for Petitioners

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. The Desegregation Litigation 1

B. The Fee Award 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE ELEVENTH AMENDMENT DOES NOT BAR COMPENSATION FOR DELAY IN PAYMENT 5

A. This Court's Eleventh Amendment Decisions Do Not Support The State's Position 5

1. The Eleventh Amendment Does Not Apply to Awards of Costs or to Interest on a Component of Costs 7

2. The Eleventh Amendment Does Not Require Specific Statutory Reference to Compensation for Delay in Section 1988 10

B. *Library of Congress* v. *Shaw* Is Not Controlling 14

1. The No-Interest Rule Cannot Be Extended to the Eleventh Amendment 14

2. The No-Interest Rule Would Be an Unreasonable Rule of Statutory Construction Here 18

C. This Court Should Overrule *Hans* v. *Louisiana* if It Reaches the Question 19

D. Section 1988 Authorizes Compensation for Delay in Fee Awards Against the States 21

II. SECTION 1988 AUTHORIZES THE AWARD OF FEES FOR PARALEGALS AT MARKET RATES 26

A. The Result the State Seeks Would Undermine the Purpose of Section 1988 28

B. The Result the State Seeks Would Increase the Costs of Litigation 30

C. The State's Arguments Are Without Merit 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases: **Page(s)**

Albrecht v. *United States*, 329 U.S. 599 (1947) 24

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975) 7

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 6, 8, 11, 20

Behlar v. *Smith*, 719 F.2d 950 (8th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984) 12

Bernard McMenamy Contractors, Inc. v. *Missouri State Highway Comm'n*, 582 S.W.2d 305 (Mo. App. 1979) 17

Blum v. *Stenson*, 465 U.S 886 (1984) 5, 23, 26-30

Bradley v. *Richmond School Bd.*, 416 U.S. 696 (1974) 24

Brown v. *Board of Educ.*, 347 U.S. 483 (1954) 1, 2

Cameo Convalescent Center, Inc. v. *Senn*, 738 F.2d 836 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) 32

Chesser v. *Illinois*, 1987 U.S. Dist. LEXIS 7398 (N.D. Ill. Aug. 11, 1987) 12

Chisholm v. *Georgia*, 2 Dall. (2 U.S.) 419 (1793) 20

Page(s)

City of Riverside v. *Rivera*,
477 U.S. 561 (1986) 22

Daly v. *Hill*,
790 F.2d 1071 (4th Cir. 1986) 25

Davis v. *County of Los Angeles*,
8 Fair Empl. Prac. Cas. (BNA)
244, 8 Empl. Prac. Dec. (CCH)
¶ 9444 (C.D. Cal. June 5, 1974) 29-30, 33

Denton Constr. Co. v. *Missouri State Highway Comm'n*,
454 S.W.2d 44 (Mo. 1970) 17

Easter House v. *Illinois Dep't of Children and Family Serv.*,
663 F. Supp. 456 (N.D.
Ill. 1987) 31

Edelman v. *Jordan*,
415 U.S. 651 (1974) 7

Employees v. *Department of Pub. Health & Welfare*,
411 U.S. 279 (1973) 6, 8, 13

Fairmont Creamery Co. v. *Minnesota*,
275 U.S. 70 (1927) 16

Feher v. *Department of Labor & Indus. Relations*, 561
F. Supp. 757 (D. Hawaii 1983) 27

Fitzpatrick v. *Bitzer*,
427 U.S. 445 (1976) 11, 15, 18

Gaines v. *Dougherty County Bd. of Educ.*, 775 F.2d 1565
(11th Cir. 1985) (per curiam) 25

Garcia v. *San Antonio Metro. Transit Auth.*,
469 U.S. 528 (1985) 20-21

Page(s)

Garmong v. *Montgomery County*,
668 F. Supp. 1000 (S.D.
Tex. 1987) 32

Gelof v. *Papineau*,
648 F. Supp. 912 (D. Del. 1986),
aff'd in part, vacated in part,
829 F.2d 452 (3d Cir. 1987) 12

General Motors Corp. v. *Devex Corp.*,
461 U.S. 648 (1983) 24

Graves v. *Barnes*,
700 F.2d 220 (5th Cir. 1983) 12

Green v. *Mansour*,
474 U.S. 64 (1985) 7, 9, 16

Grendel's Den, Inc. v. *Larkin*,
749 F.2d 945 (1st cir. 1984) 12, 25

Hans v. *Louisiana*,
134 U.S. 1 (1890) 5, 19-20

Heiar v. *Crawford County*,
746 F.2d 1190 (7th Cir. 1984)
cert. denied, 472 U.S. 1027
(1985) 23-24

Hensley v. *Eckerhart*,
461 U.S. 424 (1983) 3, 22-24, 29

Hutto v. *Finney*,
437 U.S. 678 (1978) ..... *passim*

Jacobs v. *Mancuso*,
825 F.2d 559 (1st Cir. 1987) 32, 34

Jenkins v. *Missouri*,
838 F.2d 260 (8th Cir. 1988) 26

Jenkins v. *Missouri*,
855 F.2d 1295 (8th Cir. 1988) 2

Page(s)

Jenkins v. *Missouri*,
593 F. Supp. 1485 (W.D. Mo. 1984) 2

Jenkins v. *Missouri*,
639 F. Supp. 19 (W.D. Mo. 1985), *aff'd in part, mod. in part*, 807 F.2d 657 (8th Cir. 1986) (en banc) 2

Johnson v. *Georgia Highway Express, Inc.*,
488 F.2d 714 (5th Cir. 1974) 29

Johnson v. *University College*,
706 F.2d 1205 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983) 25

Jordan v. *Multnomah County*,
815 F.2d 1258 (9th Cir. 1987) 25

Kawananakoa v. *Polyblank*,
205 U.S. 349 (1907) 15-16

Keith v. *Volpe*,
501 F. Supp. 403 (C.D. Cal. 1980) 32

Knight v. *DeMarea*,
670 S.W.2d 59 (Mo. App. 1984) 17

Lamphere v. *Brown Univ.*,
610 F.2d 46 (1st Cir. 1979) 34

Laughlin v. *Boatmen's Nat'l Bank*,
354 Mo. 467, 189 S.W.2d 974 (Mo. 1945) 17

Page(s)

Liberles v. *Daniel*,
26 Fair Empl. Prac. Cas. (BNA) 547, 26 Empl. Prac. Dec. (CCH) ¶ 31,816 (N.D. Ill. March 20, 1981), *aff'd in part, rev'd in part*, 709 F.2d 1122 (7th Cir. 1983) 12

Library of Congress v. *Shaw*,
478 U.S. 310 (1986) 4, 9-10, 14-19, 23

Lightfoot v. *Walker*,
826 F.2d 516 (7th Cir. 1987) 12, 24, 25

Loefler v. *Frank*,
108 S. Ct. 1965 (1988) 24

Maher v. *Gagne*,
448 U.S. 122 (1980) 6, 8

Milliken v. *Bradley*,
433 U.S. 267 (1977) 7

Nevada v. *Hall*,
440 U.S. 410 (1979) 15-16

New York State Ass'n for Retarded Children v. *Carey*,
711 F.2d 1136 (2d Cir. 1983) 25

Northcross v. *Board of Educ.*,
611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) 24, 25, 27

Papasan v. *Allain*,
478 U.S. 265 (1986) 7, 9, 16

Pennhurst State School & Hosp. v. *Halderman*, 451 U.S. 1 (1980) ("*Pennhurst I*") 8

Pennhurst State School & Hosp. v. *Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*") 8, 13, 16

Page(s)

Pennsylvania v. *Delaware Valley Citizens Council*, 107 S. Ct. 3078 (1987) 26

Platoro, Ltd. v. *Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983) 12

Quern v. *Jordan*, 440 U.S. 332 (1979) 7, 8

Ramos v. *Lamm*, 713 F.2d 546 (10th Cir. 1983) 12, 25, 27, 28

Richardson v. *Byrd*, 709 F.2d 1016 (5th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1985) 27, 31

Rogers v. *Okin*, 821 F.2d 22 (1st Cir. 1987) 12

St. Joseph Light & Power Co. v. *Zurich Ins. Co.*, 698 F.2d 1351 (8th Cir. 1983) 17

Save Our Cumberland Mountains, Inc. v. *Hodel*, 826 F.2d 43 (D.C. Cir. 1987), *vacated in part*, 857 F.2d 1516 (D.C. Cir. 1988) 27

Sisco v. *J.S. Alberici Constr. Co.*, 733 F.2d 55 (8th Cir. 1984) 25

Slay Warehousing Co. v. *Reliance Ins. Co.*, 489 F.2d 214 (8th Cir. 1974) 17

Smyth v. *United States*, 302 U.S. 329 (1937) 24

Page(s)

Spanish Action Comm. v. *City of Chicago*, 811 F.2d 1129 (7th Cir. 1987) 27

Spray-Rite Serv. Corp v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984) 31

Stanford Daily v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974) 29

Steppelman v. *State Highway Comm'n*, 650 S.W.2d 343 (Mo. App. 1983) 17

Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975) 24, 29

The Siren, 7 Wall. (74 U.S.) 152 (1868) 15

United States v. *Chemical Found., Inc.*, 272 U.S. 1 (1926) 10

Vaughns v. *Board of Educ.*, 598 F. Supp. 1262 (D. Md. 1984), *aff'd*, 770 F.2d 1244 (4th Cir. 1985) 27

Whalen, Murphy, Reid v. *Estate of Roberts*, 711 S.W.2d 587 (Mo. App. 1986) 17

Welch v. *Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941 (1987) 8, 12, 15-16, 19

Constitutional Provisions and Statutes:

U.S. Const. art III 20

Page(s)

U.S. Const. amend. XI ..... *passim*

U.S. Const. amend. XIV 4, 6, 20

42 U.S.C. § 1988 ..... *passim*

42 U.S.C. § 20003–5(k) 9

Mo. Rev. Stat. § 408.020 (1986) 17

Legislative Materials:

H. R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 18, 20-23, 28

S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) 22-25, 28, 29

2 Annals of Cong. 1897 (1791) 21

Other Authorities:

Bureau of Labor, Statistics, U.S. Dep't of Labor, *Occupational Outlook Quarterly* (Spring 1986) 31

Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. Colo. L. Rev. 1 (1972) 15

Model Rules of Professional Conduct (ABA 1983) 23

Model Standards and Guidelines for Utilization of Legal Assistants, (NALA 1984) 31

F. Pollock & F. Maitland, *History of English Law* (2d ed. 1899) 15

R. Posner, *Economic Analysis of Law* (3d Ed. 1986) 23

No. 88–64

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

KALIMA JENKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS KALIMA JENKINS, *et al.*

STATEMENT OF THE CASE

Plaintiffs' counsel come before this Court seeking affirmance of the fees awarded them for having proven unconstitutional segregated education in Kansas City, Missouri — and having obtained extensive remedies that hold real promise of equal educational opportunity and meaningful desegregation.

The victory was neither swift nor easy.

A. The Desegregation Litigation

In 1977, twenty-three years after *Brown* v. *Board of Education*, 347 U.S. 483 (1954), segregation still infected the education of black children in the Kansas City School District (the "School District"). The School District, its School Board, and the children of two School Board members commenced this action, seeking desegregation remedies against the State of Missouri and others.

In 1979, Arthur Benson entered an appearance on behalf of the plaintiff school children. Mr. Benson and his small staff prosecuted the case through three years of extensive motion practice and discovery. By 1982, however, it was apparent that this bitterly contested litigation would require resources far beyond Mr. Benson's. The School District, which had been realigned as a nominal defendant, admitted its historic responsibility for discrimination and supported plaintiffs. But the State — whose pre-*Brown* laws required segregation, and which had done virtually nothing post-*Brown* to end segregation — fought this litigation at every step, and with every resource at its disposal. And so, Mr. Benson sought and obtained the assistance of the NAACP Legal Defense and Educational Fund, Inc. ("the LDF"), a nonprofit organization dedicated to the enforcement of civil rights. The LDF entered the case as Mr. Benson's co-counsel in March 1982.

In September 1984, after a 92-day bench trial, the district court held the State defendants and the School District liable. *Jenkins* v. *Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984). In June 1985, after a further two-week hearing on remedies, plaintiffs obtained an order requiring $37 million in capital improvements and $50.7 million in new operating programs. *Jenkins* v. *Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd in part, mod. in part*, 807 F.2d 657 (8th Cir. 1986) (en banc).

While the initial remedial order was on appeal, and after the appeal, the district court ordered greatly increased relief: an initial $25 million magnet-school plan, later expanded by $196 million, and long-range capital improvements totalling $260 million. The court of appeals affirmed. *Jenkins* v. *Missouri*, 855 F.2d 1295 (8th Cir. 1988).

Achieving these results in the face of Missouri's recalcitrance was not easy. From 1979, Mr. Benson and attorneys he employed devoted 10,875 hours to the case. His law clerks (working law students) and paralegals worked 8,108 hours. From early 1983 to the end of 1985, Mr. Benson devoted nearly all of his professional time to this case — he could accept no other employment. Although his dedicated associates and employees agreed to defer payment for overtime work, he paid them their base salaries throughout the litigation. He

exhausted his personal resources and was able to persist only by borrowing $633,000. Through December 31, 1986, he paid $113,706 in interest on this debt and continued to pay approximately $5,000 a month (Benson Aff., filed Jan. 16, 1987; Tr. 131-32).

Beginning in 1982, LDF attorneys spent 10,854 hours on the case. Recent law school graduates, law clerks and paralegals worked 15,517 hours. This was the most expensive case in which the LDF had ever been involved; largely because of it, the LDF had deficits of $700,000 in 1983 and more than $1 million in 1984 (Tr. 46, 48; Pl. Ex. 2).

B. The Fee Award

Mr. Benson and the LDF, as attorneys for the prevailing plaintiffs, filed applications under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("Section 1988"). The district court held a one-day hearing, at which plaintiffs presented four witnesses. The State presented no witnesses; it did no more than ask Mr. Benson a few clarifying questions about his application (Tr. 121-30).

On May 11, 1987, the district court issued an opinion meticulously analyzing the positions of the parties. The court awarded Mr. Benson fees and expenses of $1,614,437 for work on the merits, and $72,702 for the fees litigation. The court later awarded Mr. Benson an additional $42,090 for monitoring fees and expenses, bringing the total Benson fees judgment to $1,729,230. The court awarded the LDF fees and expenses of $2,323,730 for work on the merits, and $42,145 for work on the fees litigation, for a total LDF judgment of $2,365,875. [1/]

1/ Counsel did not request fees for all the time spent on the litigation. In compliance with *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), the applications excluded 3,628 attorney hours and 7,046 hours for paralegals, law clerks and recent law graduates, representing time allocable to unsuccessful claims. Based on the hourly rates actually awarded, these reductions amounted to more than $700,000. The district court required a further reduction of 3.5 hours in the LDF application (Pet. App. A32).

The court found that current market rates for Kansas City attorneys with litigation experience and expertise comparable to Mr. Benson's ranged from $125 to $175 an hour, and that Mr. Benson's rate "would fall at the higher end of the range based on his expertise in the area of civil rights" (Pet. App. A26). The court applied a small enhancement to Mr. Benson's time, awarding him $200 an hour to compensate for "preclusion of other employment," the "undesirability of this case" and "delay in payment" (*id.*). The court based its award for the work of the other attorneys, as well as paralegals, law clerks and recent law graduates, on current Kansas City market rates, "to compensate . . . for the delay in payment" (*id.*; *see also id.* at A30, A33, A34).

SUMMARY OF ARGUMENT

Section 1988 authorizes the federal courts to award prevailing civil rights plaintiffs "a reasonable attorney's fee as part of the costs." The courts below did so. Before this Court, the State raises two objections to the award. Each is without merit.

1. The State contends that the courts below, by considering delay in payment in assessing a "reasonable" fee, awarded "prejudgment interest" (Pet. Br. 9, 21). This violates the Eleventh Amendment, the State claims, because Section 1988 does not provide for prejudgment interest against the states "in unmistakable language" (*id.* at 11).

The Eleventh Amendment, however, does not apply to fee awards in actions for prospective relief, such as this. Moreover, Section 1988, enacted pursuant to the Fourteenth Amendment, abrogates any immunity the states might otherwise enjoy. The Eleventh Amendment does not require that such a statute authorize compensation for delayed payment "in unmistakable language" or in any particular form. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), on which the State relies, has no application to the Eleventh Amendment.

Moreover, this case — an action by citizens of a state against that state — does not fall within the plain language of the Eleventh Amendment. *Hans* v. *Louisiana* 134 U.S. 1 (1890), which held the Eleventh amendment applicable to such cases, should be overruled.

2. The State contends that the courts below erred in awarding fees for paralegals at market rates rather than "cost" (Pet. Br. 24–27). Neither the language of Section 1988, nor its legislative history, nor any decision of this Court supports the State's position. Indeed, this Court has specifically rejected the view that fees under Section 1988 should "be calculated according to the cost of providing legal services rather than according to the prevailing market rate." *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984). The result Missouri seeks would undermine the purpose of Section 1988 by discouraging private enforcement of the civil rights laws. It would also promote costly, inefficient litigation by pressuring lawyers to do work that could be done by paralegals.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT BAR COMPENSATION FOR DELAY IN PAYMENT

The State does not suggest that the Eleventh Amendment restricts Congress' power to authorize fee awards against the states. Nor does the State dispute Congress' power to authorize compensation for delay. Rather, the State contends that such compensation constitutes "interest," and that the Eleventh Amendment bars the federal courts from awarding interest against a state absent a specific, explicit statutory mandate. Neither precedent nor policy supports the State's view.

A. This Court's Eleventh Amendment Decisions Do Not Support The State's Position

This Court has held that the Eleventh Amendment requires "an extraordinarily explicit statutory mandate" before a federal court may infer that Congress has authorized it to hear certain claims

against the states. *Hutto* v. *Finney*, 437 U.S. 678, 695 (1978). Where it applies, this requirement "insures that Congress has not imposed 'enormous fiscal burdens on the States' without careful thought." *Id.* at 697 n.27 (quoting *Employees* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973)). Accordingly, before a federal court may hear a federal claim against a state for retroactive, monetary relief, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakably clear language in the statute itself." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985). Relying on *Atascadero* and similar decisions, the State contends that the fee awards in this case were impermissible, because Section 1988 does not expressly refer, "in the statute itself," to liability of the states or compensation for delay (Pet. Br. 16).

The State's reliance is misplaced. The stringent standards for abrogation set forth in this Court's Eleventh Amendment decisions do not address litigation costs. Rather, they are informed and limited by concern for the "enormous fiscal burdens" that *retroactive liability for prelitigation conduct* may impose upon the states. Moreover, those decisions have no bearing on the issue here — the scope of a statute that lawfully and undisputedly applies against the states.

In *Hutto*, the Court held that Section 1988 authorizes costs, including attorneys' fees, against state defendants, notwithstanding the Eleventh Amendment. Two rationales compelled this conclusion. First, Section 1988 "imposes attorney's fees 'as part of the costs,'" and the Court "has never viewed the Eleventh Amendment as barring such awards." 437 U.S. at 695; *see Maher* v. *Gagne*, 448 U.S. 122, 131-32 & n.14 (1980). Second, "even if the Eleventh Amendment would otherwise present a barrier to an award of fees against a state, Congress was clearly acting within its power under § 5 of the Fourteenth Amendment in removing that barrier." *Maher*, 448 U.S. at 132. Either of these rationales disposes of Missouri's claim to immunity.

1. The Eleventh Amendment Does Not Apply to Awards of Costs or to Interest on a Component of Costs

In enacting Section 1988, Congress provided the statutory authorization necessary to award attorney's fees to prevailing civil rights plaintiffs. *See Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975). This Court's decisions make clear that the Eleventh Amendment has no effect on this statute.

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the Court held that the Eleventh Amendment bars actions in federal court seeking to impose retrospective monetary liabilities on the states. *Id.* at 668. The Court distinguished prospective relief, even though prospective relief may have "an ancillary effect on the state treasury." *Id.* [2/] As the Court has explained, "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). But "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Id.*; *see also Papasan* v. *Allain*, 478 U.S. 265, 278 (1986).

In holding Section 1988 applicable to the states in *Hutto*, the Court rested its decision squarely on this distinction. The Court recognized that the Eleventh Amendment requirement of "an extraordinarily explicit statutory mandate" is limited to "retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief." 437 U.S. at 695. The Court emphasized that, since 1849, "[c]osts have traditionally been awarded without regard for the States' Eleventh Amendment immunity," and that "[t]he Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Id.* (citations and footnote omitted).

2/ *See also Quern* v. *Jordan*, 440 U.S. 332 (1979) (mailing to inform class members of legal rights in federal court); *Milliken* v. *Bradley*, 433 U.S. 267 (1977) ($6 million in prospective relief).

Accordingly, the Court held that the Eleventh Amendment does not affect attorney's fees under Section 1988, because they are "part of the costs," rather than retroactive liability:

> Unlike ordinary "retroactive" relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

Id. at 695 n.24. And because the Eleventh Amendment does not apply, attorney's fees may be awarded against the states *without* an "explicit statutory mandate" from Congress:

> Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity.

Id. at 696.

The Court reaffirmed the vitality of the retroactive–prospective distinction in *Quern* v. *Jordan*, 440 U.S. 332, 344–45 n.16 (1979), and in *Maher* v. *Gagne*, 448 U.S. 122, 131 n.14. *(1980). See also Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 105–06 (1984) ("*Pennhurst II*"). No Eleventh Amendment decision of this Court has required an "explicit statutory mandate" for prospective relief from a violation of federal law, or for awards of costs incurred in obtaining such relief. 3/

3/ *See Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2944 & n.1 (1987) (action for damages under the Jones Act); *Atascadero*, 473 U.S. at 235 ("retroactive monetary relief under § 504 of the Rehabilitation Act of 1973"); *Pennhurst II*, 465 U.S. at 91 (state law claim); *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 24 (1980) ("*Pennhurst I*") (no violation of federal law; "Congress must express clearly its intent to impose conditions on the grant of federal funds"); *Employees* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 281 (1973) (overtime compensation under Fair Labor Standards Act of 1938).

This distinction negates any inference that the Eleventh Amendment affects compensation for delay in payment of attorney's fees under Section 1988. Such compensation does not constitute "retroactive liability for prelitigation conduct." *Hutto*, 437 U.S. at 695. It does not "compensate the plaintiff for the injury that first brought him into court." *Id.* at 695 n.24. Merely ancillary to prospective substantive relief, compensation for delay in a fee award is part of a remedy "designed to end a continuing violation of federal law," *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); it does not "compensate a party injured in the past by an action . . . that was illegal." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986).

The State, relying on *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), contends that compensation for delay in payment of attorney's fees is "damages," not "costs" (Pet. Br. 19). But *Library of Congress* does not support the State's position. In that case, the Court applied the "no–interest rule," a longstanding rule of statutory construction applicable in actions against the federal government. As the Court stated the rule:

> In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award.

478 U.S. at 314. Under this standard, the Court held that the attorney's fees provision of Title VII, 42 U.S.C. § 2003e-5(k), does not authorize prejudgment interest on fees awarded against the federal government. Although the statute authorizes "a reasonable attorney's fee as part of the costs" and provides that "the United States shall be liable for costs the same as a private person," the Court held that these references to "costs" do not satisfy the stringent requirements of the no–interest rule. As the Court observed, "Prejudgment interest . . . is considered as damages, not a component of 'costs.'" 478 U.S. at 321.

The distinction between "costs" and "damages," while significant in *Library of Congress*, is immaterial here. First, the issue here is not whether compensation for delay in payment of costs is "costs" or "damages." The issue under the Eleventh Amendment is only whether

such compensation constitutes "retroactive liability for prelitigation conduct," *Hutto*, 437 U.S. at 695 — clearly it does not.

Second, *Library of Congress* rested on the federal government's sovereign immunity, which specifically includes an immunity from the award of any costs, absent the government's consent. *See United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 20–21 (1926). The statute at issue in *Library of Congress* was thus a waiver of immunity from "costs," to be strictly construed. *Library of Congress*, 478 U.S. at 318. And the view of prejudgment interest as "damages, not a component of 'costs,'" informed the Court's determination that Congress' general reference to "costs," did not satisfy the stringent requirements of the no–interest rule. *Id.* at 321.

Here, by contrast, the states do not enjoy any Eleventh Amendment immunity from costs comparable to the sovereign immunity of the federal government. *See Hutto*, 437 U.S. at 695–97. A statute providing for costs against the states is thus not a waiver to be narrowly construed. Nor do the states enjoy the benefit of an Eleventh Amendment "no–interest rule" requiring the searching and technical examination into the meaning of "costs" that was appropriate in *Library of Congress*. (*See infra* pp. 14-19.) Here it is more appropriate to recognize that interest on costs is not any part of damages on the underlying claim; interest on costs is fairly only a part of costs.

2. The Eleventh Amendment Does Not Require Specific Statutory Reference to Compensation for Delay in Section 1988

Even if compensation for delayed payment of attorney's fees were a retroactive liability — though the attorney's fees themselves are not — that characterization would not affect the result in this case. Even if the Eleventh Amendment would otherwise immunize the states from compensation for delay in a fee award, Congress has abrogated that immunity. In holding that the Eleventh Amendment does not bar application of Section 1988 to the states, this Court reaffirmed that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment." *Hutto*, 437 U.S. at 693 (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)). The Court held that Congress, in enacting Section 1988, "undoubtedly intended to exercise that power." *Id.* at 693.

The State contends that this exercise of Congress' power may not be construed to embrace compensation for delay in payment, absent a clear reference to such compensation in the statute itself (Pet. Br. 12). While the State seeks to ground this requirement in the Eleventh Amendment, none of this Court's Eleventh Amendment decisions suggests such a rule. Of the cases on which the State relies, only *Atascadero* held Congress' intent insufficiently clear to abrogate the Eleventh Amendment in enforcing the Fourteenth Amendment. And the issue in *Atascadero* was whether a particular statute (Section 504 of the Rehabilitation Act of 1973) authorized actions against the states at all. Neither *Atascadero* nor any of this Court's other decisions suggests that the requirement of "unmistakably clear language" might apply in determining *the scope* of a statute, such as Section 1988, that undisputedly abrogates the states' Eleventh Amendment immunity.

The State cannot and does not dispute that Section 1988 applies against it. It cannot and does not dispute that the balance required by the federal system has been struck in favor of fee awards against the states when they have violated the civil rights laws. The State contends only that one of the natural incidents of such awards — compensation for delay in payment — occupies a special position and requires separate, explicit congressional authorization. This contention has no more basis in the Eleventh Amendment than it does in logic.

This Court has never held that the Eleventh Amendment requires a separate, express reference to prejudgment interest, or compensation for delay, before a state may be held liable for such payments under a federal statute that otherwise lawfully applies to it. And

the lower courts have routinely made such awards under Section 1988, as well as under other statutes that create rights against the states. 4/ Indeed, even where an express waiver of Eleventh Amendment immunity by the state is required, no separate, express waiver respecting prejudgment interest has previously been considered necessary. *See Platoro, Ltd.* v. *Unidentified Remains of a Vessel*, 695 F.2d 893, 906 & n.20 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983).

The state urges that "the Eleventh Amendment issue was not raised" in cases such as these (Pet. Br. 10 n.6). Yet the one lower court case the state cites against these precedents did not consider "the Eleventh Amendment issue" at all. It merely assumed the existence of an "Eleventh Amendment immunity from prejudgment interest on fee awards," without explanation. *Rogers* v. *Okin*, 821 F.2d 22, 27 (1st Cir. 1987).

Nothing in this Court's Eleventh Amendment jurisprudence supports the assumption in *Rogers*. In *Welch* v. *Texas Department of Highways & Public Transportation*, 107 S. Ct. 2941 (1987), the Court elaborated the rationale behind the requirement that Congress express its intention to abrogate the Eleventh Amendment "in unmistakable language in the statute itself":

> We have been unwilling to infer that Congress intended to negate the States' immunity from suit in federal court, given the "vital role of the doctrine of sovereign immunity in our federal system." . . . Moreover, the courts properly are reluctant to infer that Congress has expanded our jurisdiction.

4/ *See, e.g., Lightfoot* v. *Walker*, 826 F.2d 516 (7th Cir. 1987) (Section 1988); *Grendel's Den, Inc.*, v. *Larkin*, 749 F.2d 945 (1st Cir. 1984) (same); *Ramos* v. *Lamm*, 713 F.2d 546 (10th Cir. 1983) (same); *Graves* v. *Barnes*, 700 F.2d 220, 224 (5th Cir. 1983) (fee award under 42 U.S.C. § 1973*l*(e)); *Behlar* v. *Smith*, 719 F.2d 950 (8th Cir. 1983) (backpay award under Title VII), *cert. denied*, 466 U.S. 958 (1984); *Chesser* v. *Illinois*, 1987 U.S. Dist. LEXIS 7398, at 12 (N.D. Ill. Aug. 11, 1987) (same); *Gelof* v. *Papineau*, 648 F. Supp. 912, 929, 931 (D. Del. 1986) (same), *aff'd in part, vacated in part on other grounds*, 829 F.2d 452 (3d Cir. 1987); *Liberles* v. *Daniel*, 26 Fair Empl. Prac. Cas. (BNA) 547, 26 Empl. Prac. Dec. (CCH) ¶ 31,816 (N.D. Ill. March 20, 1981) (same), *aff'd in part, rev'd in part on other grounds*, 709 F.2d 1122 (7th Cir. 1983).

Id. at 2946 (quoting *Pennhurst II*, 465 U.S. at 99). These considerations properly require a searching inquiry before courts conclude that Congress intended a particular enactment to impose retroactive liability on the states. As this Court has recognized, the requirement of a formal indication of Congress' intent "insures that Congress has not imposed 'enormous fiscal burdens on the States' without careful thought". *Hutto*, 437 U.S. at 697 n.27 (quoting *Employees* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973)).

But the needs of the federal system certainly do not suggest that compensation for delay should occupy any special place under the Eleventh Amendment, any more than any other particular that "a reasonable attorney's fee" may embrace. The State contends that including compensation for delay in fee awards would "impose what could be a substantial financial obligation on the States" (Pet. Br. 22). Admittedly, the state treasuries will pay somewhat greater awards if they must compensate for delay. But the same is true "whenever a filing fee, or a new item, such as an expert witness' fee, is added to the category of taxable costs." *Hutto*, 437 U.S. at 697. And "it would be absurd to require an express reference to state litigants" for each such item. *Id.* at 696–97. Indeed, the State's contention is belied by the circumstances of this case. The total fee award here — approximately $4 million for nearly a decade of litigation — is about one percent of the cost of the substantive remedies ordered to date. The compensation for delay is only a fraction of that one percent. To the State, the additional burden is inconsequential — only to the attorneys is it significant.

Nor does the inclusion of compensation for delay constitute an expansion of the federal courts' jurisdiction. Congress has by statute given the federal courts jurisdiction to entertain applications for costs, including attorney's fees, against the states. It cannot be a further expansion of jurisdiction to consider, in assessing such awards, all the factors normally required by the statute's purposes, including delay in payment.

B. *Library of Congress* v. *Shaw* Is Not Controlling

The State contends that *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), proscribes compensation for delayed payment in any fee award against a state under Section 1988. As the State would have it, the no–interest rule applied in *Library of Congress* is a principle of Eleventh Amendment jurisprudence. That view, however, finds no support in *Library of Congress*, which has nothing to do with the Eleventh Amendment, does not mention the Eleventh Amendment and does not rely on any precedent construing the Eleventh Amendment.

1. The No–Interest Rule Cannot Be Extended to the Eleventh Amendment

In *Library of Congress*, the Court traced the history of the no–interest rule to the "historical view that interest is an element of damages separate from damages on the substantive claim," and the corollary common–law rule that, because interest was "generally presumed not to be within the contemplation of the parties," courts in England "allowed interest by way of damages only when founded upon agreement of the parties." 478 U.S. at 314–15 (footnote omitted). The Court noted that the common–law requirement of an agreement gradually faded in suits between private parties, but "assumed special force when applied to claims for interest against the United States," since "[a]s sovereign, the United States, in the absence of its consent, is immune from suit." *Id.* at 315. As the Court stated, "This basic rule of sovereign immunity, in conjunction with the requirement of an agreement to pay interest, gave rise to the rule that interest cannot be recovered unless the award of interest was affirmatively and separately contemplated by Congress." *Id.* This explanation of the no–interest rule demonstrates its inapplicability here.

First, the common–law requirement of an agreement to pay interest can have no effect where, as here, Congress has acted to enforce the Fourteenth Amendment. When Congress has done so, the states' consent to suit is irrelevant:

> Congress can abrogate the Eleventh Amendment without the States' consent when it acts pursuant to its power "'to enforce, by appropriate legislation' the substantive provisions of the Fourteenth Amendment."

Welch v. *Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2946 (1987) (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976)).

Congress undoubtedly had the power, in Section 1988, to require fee awards, including compensation for delay, with or without states' agreement. The only question is whether Congress made that choice. All the available evidence indicates it did. (*See infra* pp. 21-26.)

Second, the "basic rule of sovereign immunity" relied on in *Library of Congress* is not applicable to actions governed by the Eleventh Amendment. It derives from the common–law doctrine under which the sovereign was immune, absent its consent, "from suit in its own courts." *Nevada* v. *Hall*, 440 U.S. 410, 414 (1979); *see also The Siren*, 7 Wall. (74 U.S.) 152, 154 (1868) ("It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent."). That common–law doctrine has origins — and contours — very different from those of the constitutional immunity embodied in the Eleventh Amendment.

The common–law doctrine "had its origins in the feudal system," under which "no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord. Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued." *Nevada* v. *Hall*, 440 U.S. at 415 (citing F. Pollock & F. Maitland, *History of English Law* 518 (2d ed. 1899); Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. Colo. L. Rev. 1, 2–5 (1972)). The doctrine has been explained also as embodying a fundamental attribute of sovereignty, "the right to determine what suits may be brought in the sovereign's own courts." *Id.* Thus, Justice Holmes explained sovereign immunity as based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa* v. *Polyblank*, 205 U.S. 349, 353 (1907),

quoted in Nevada v. *Hall*, 440 U.S. at 415–16. Accordingly, the common-law doctrine of sovereign immunity does not apply to actions against a sovereign in the courts of another, co-equal (or "higher") sovereign.

The Eleventh Amendment, by contrast, embodies a constitutional principle that is necessarily subject to the demands of our federal system. In particular, the immunity conferred by the Eleventh Amendment must be reconciled with "the need to promote the vindication of federal rights." *Pennhurst II*, 465 U.S. at 105; *see also Papasan* v. *Allain*, 478 U.S. 265, 276–78 (1986); *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). There is thus no reason to assume that immunity under the Eleventh Amendment is coextensive with the sovereign's common-law immunity from suit in its own courts.

Nothing in the "structure and requirements of the federal system," *Welch*, 107 S. Ct. at 2953, requires this Court to read a no-interest rule into the Eleventh Amendment. Once Congress has determined, as it did with Section 1988, that a particular federal policy merits enforcement against the states, Congress has declared that the usual federal–state balance does not obtain. And the requirements of the federal system dictate that the state is, to that extent at least, no longer sovereign, but is subject to the same rights and liabilities as other parties. The applicable principle of federalism is that articulated in *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927):

> Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such.

Id. at 74. Specifically in the matter of costs — the issue under Section 1988 — "a federal court may treat a State like any other litigant." *Hutto*, 437 U.S. at 696.

Third, even if the constitutional immunity of the states under the Eleventh Amendment were coextensive with their common-law immunity as sovereigns in their own courts, that would not require application of a no-interest rule here. Although common-law notions of sovereign immunity are a necessary predicate to the no-interest

rule, it is far from clear that the rule is an inescapable feature of common-law sovereign immunity. The State of Missouri, for example, does not apply such a rule in its own courts. While Missouri has a general statute authorizing awards of prejudgment interest, the statute does not explicitly provide for such awards against the state. Mo. Rev. Stat. § 408.020 (1986). [5/] The Missouri courts, however, apply it against the State. [6/] The no-interest rule, which Missouri itself does not credit, cannot reasonably be considered so basic to sovereign immunity as to warrant being enshrined in the Constitution. [7/]

[5/] Section 408.020 provides:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

[6/] *Denton Constr. Co.* v. *Missouri State Highway Comm'n*, 454 S.W.2d 44 (Mo. 1970); *Steppelman* v. *State Highway Comm'n.*, 650 S.W.2d 343, 345 (Mo. App. 1983); *Bernard McMenamy Contractors, Inc.* v. *Missouri State Highway Comm'n*, 582 S.W.2d 305 (Mo. App. 1979).

[7/] Alternatively, the Missouri decisions awarding prejudgment interest against the State may be viewed as construing § 408.020 to waive any no-interest immunity that might otherwise exist. Specifically, an award of attorney's fees meets the standards of Section 408.020. *See Laughlin* v. *Boatmen's Nat'l Bank*, 354 Mo. 467, 189 S.W.2d 974 (Mo. 1945) (unliquidated claims for legal services); *Whalen, Murphy, Reid* v. *Estate of Roberts*, 711 S.W.2d 587, 590 (Mo. App. 1986) (error not to award prejudgment interest on an attorney's fees claim); *Knight* v. *DeMarea*, 670 S.W.2d 59 (Mo. App. 1984). And where Section 408.020 applies, its provisions are mandatory; *Denton Constr. Co.* v. *Missouri State Highway Comm'n*, 454 S. W. 2d (Mo. 1970); *St. Joseph Light & Power Co.* v. *Zurich Ins. Co.*, 698 F.2d 1351, 1355 (8th Cir. 1983); *see also Slay Warehousing Co.* v. *Reliance Ins. Co.*, 489 F.2d 214, 215 (8th Cir. 1974).

While a waiver of immunity in Missouri's own courts would be insufficient "to subject [it] to suit in federal court," *Atascadero*, 473 U.S. at 241 (emphasis omitted), Missouri is already subject "to suit in federal court," by virtue of the important federal policies embodied in the Fourteenth Amendment and the statutes implementing it. Thus, even if the Eleventh Amendment otherwise entailed an immunity from interest, federalism concerns would not justify its invocation by a defendant like Missouri, which has waived the immunity in cases where no national policy is involved.

2. The No-Interest Rule Would Be an Unreasonable Rule of Statutory Construction Here

Library of Congress in the last analysis did no more than apply an established principle of statutory construction in its traditional context. To apply the no-interest rule here would be a very different matter.

Library of Congress rested explicitly on a long-established and oft-repeated fixture of our national jurisprudence:

> For well over a century, this Court, executive agencies, and Congress itself have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result.

478 U.S. at 316. The Court cited numerous decisions, prior to the enactment of Title VII, the statute in issue, affirming and reaffirming the requirements of the no-interest rule. *See id.* at 315-17. The Court cited numerous opinions of Attorneys General, over the past 170 years, articulating the same rule. Indeed, the Court noted Congress' own recognition of the no-interest rule: "When Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly." *Id.* at 318 (footnote omitted).

Congress acted against a very different background when it authorized the award of civil rights attorney's fees against the states. Congress specifically relied upon the fact that "the 11th Amendment is not a bar to the awarding of counsel fees against state governments." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 n.14 (1976) ("House Report") (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976)). Congress had no reason to suspect that a separate, express reference to interest or compensation for delay was necessary. There is no reason to ignore

Congress' purpose solely because it was not expressed in a particular form — a form that this Court has never previously required. [8/]

C. This Court Should Overrule *Hans* v. *Louisiana* if It Reaches the Question

If this Court were to conclude, with the State, that the Eleventh Amendment bars compensation for delay, it would then face the question whether the Eleventh Amendment applies in this case. The language of the amendment could scarcely be simpler, plainer or clearer: it prohibits only actions "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This action, however, involves claims by citizens of a state against their own state.

In *Welch*, four members of this Court reaffirmed the holding of *Hans* v. *Louisiana*, 134 U.S. 1 (1890), that the Eleventh Amendment embodies a principle of state sovereign immunity broader than its terms, extending to actions by a citizen of a state against that state. But four other members of the Court reaffirmed the view they expressed in *Atascadero*, 473 U.S. at 247-302 (Brennan, J., dissenting), that *Hans* misconstrued the Eleventh Amendment. *Welch*, 107 S. Ct. at 2958-70. They argued that the Eleventh Amendment does not bar claims under the federal question and admiralty jurisdictions or actions by a citizen against his or her own state. *Id.* Justice Scalia found it unnecessary to consider whether *Hans* was correctly decided, saying that Congress had enacted the statute in question (the Jones Act)

[8/] Even if the no-interest rule applied under the Eleventh Amendment, it would not apply here, because no interest was awarded. Unlike the award in *Library of Congress*, the award here was based on current market rates; it was not adjusted by an overall factor to compensate for all losses due to delay. Indeed, the record here shows that use of hourly rates could not fully compensate for lost interest (Tr. 113-16; Pl. Ex. 5, at 10; Ward Aff., filed Jan. 16, 1987). While the Court in *Library of Congress* stated that awards of interest, under any name, are forbidden absent the consent of the United States, the present case does not involve "simply . . . devising a new name for an old institution." *Library of Congress*, 478 U.S. at 321. Here, the method used — not just the name applied — was different from awarding interest. And this method, basing the lodestar on current market rates, was not before the Court in *Library of Congress*.

against the background of *Hans* and therefore could not have intended to grant to federal courts jurisdiction over actions against the states. *Id.* at 2957-58.

If the Court were now to conclude that the Eleventh Amendment includes a no-interest rule, this case would necessarily raise the question that Justice Scalia did not reach. In enacting Section 1988, Congress clearly intended that it apply against the states, as this Court has held. Rather than acting within the confines of *Hans*, Congress explicitly relied on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), which held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456 (citing *Hans*); *see* House Report at 7 n.14.

In urging the Court to overrule *Hans*, we have little to add to Justice Brennan's dissenting opinions in *Atascadero* and *Welch*. We do note, however, with all respect, that the plain language of the Eleventh Amendment is impossible to square with the holding in *Hans*. In its extraordinarily precise specificity — prohibiting suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" — it stands in stark contrast to the broad language of the first ten amendments. That specificity suggests an equally specific intent: to override the holding in *Chisholm* v. *Georgia*, 2 Dall. (2 U.S.) 419 (1793), which construed Article III to confer jurisdiction of precisely such suits, even where jurisdiction would not otherwise obtain. *See Welch*, 107 S. Ct. at 2964-68 (Brennan, J., dissenting).

We note also that the framers of the Eleventh Amendment would not likely have considered the states to need protection from Congress or, therefore, from the federal courts under the federal question jurisdiction. Congress was limited to enumerated powers, and the Tenth Amendment reserved to the states, and to the people, all powers not conferred on Congress. As this Court has recognized, the structure of the federal government provided whatever protection the states might need from the federal legislature:

> It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States

> from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections . . . They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State.

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985); *see also id.* at 549 ("'Interference with the power of the states was no constitutional criterion of the power of Congress.'") (quoting 2 Annals of Cong. 1897 (1791) (Madison)).

If the Constitution leaves Congress free to regulate the states under its commerce power — if the political process is presumed to afford the states any needed protection from such regulation — then surely the framers of the Eleventh Amendment did not believe that the same political process would be inadequate to protect the states, to the extent necessary, from claims arising under the Constitution and laws of the United States.

D. Section 1988 Authorizes Compensation for Delay in Fee Awards Against the States

Since Congress undisputedly has the power to require that the states compensate for delay in payment under Section 1988, and since the Eleventh Amendment imposes no special standard in determining whether Congress exercised that power, the ultimate question is whether Congress has done so.

The anwer is clear. As this Court has observed, Section 1988 "primarily applies to laws passed specifically to restrain state action." *Hutto*, 437 U.S. at 694. It "has a history focusing directly on the question of state liability." *Id.* at 698 n.31. According to the House Report:

> The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.

House Report at 7, *quoted in Hutto*, 437 U.S. at 694. To hold that Section 1988 applies against the states with any less force than against other parties would be to ignore Congress' intent. And Congress' purpose in Section 1988 – to attract first-quality lawyers to civil rights cases by providing fully compensatory fees – cannot be accomplished without compensation for delay.

Congress enacted Section 1988 in recognition of the important role of private plaintiffs in civil rights enforcement — a recognition that plaintiffs with meritorious civil rights claims "appear before the court cloaked in a mantle of public interest." *Id.* at 6. "The purpose of § 1988 is to ensure 'effective access to judicial process' for persons with civil rights grievances." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (citing House Report at 1).

Congress considered fee awards an "essential remedy," because civil rights plaintiffs often have little or no money with which to hire a lawyer. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) ("Senate Report"). In addition, the remedies in civil rights litigation may be "nonpecuniary in nature." *Id.* at 6. Such remedies provide no fund from which to pay a lawyer. *See generally City of Riverside* v. *Rivera*, 477 U.S. 561, 577–78 (1986). Without fee awards, private enforcement of the civil rights laws would thus be an empty promise — private citizens would have no "meaningful opportunity to vindicate the important Congressional policies which these laws contain." Senate Report at 2.

In view of the critical importance of private civil rights enforcement, it is necessary to attract first-rate lawyers to the task — persons deprived of their civil rights should not be sent to the back of the bus to find a lawyer — and Congress so understood. Congress sought "to attract competent counsel in cases involving civil and constitutional rights." House Report at 9. To accomplish this, Congress determined to compensate prevailing counsel in civil rights cases just

as in other complex litigation on behalf of paying clients. Fee awards under Section 1988 must be similar to what "is traditional with attorneys compensated by a fee-paying client." Senate Report at 6. Accordingly:

> It is intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . . .

Id., *quoted in Blum* v. *Stenson*, 465 U.S. 886, 893 (1984); *see also* House Report at 8–9. As this Court held in *Blum*:

> The statute and legislative history establish that "reasonable fees" under § 1988 are to be calculated according to the prevailing market rates in the relevant community.

465 U.S. at 895. And where "a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435.

These principles require that fee awards include, in appropriate circumstances, an element of compensation for delay in payment. Lawyers typically bill their clients, and expect payment, on a current basis, monthly or quarterly. Indeed, lawyers are free to require advance payment of a fee. *Model Rules of Professional Conduct*, Rule 1.5 comment (ABA 1983). In contrast, an attorney enforcing the civil rights laws on behalf of an impecunious client must await payment until his or her client becomes a "prevailing party." And, of course, compensation delayed is compensation diminished. As inflation erodes the real value of currency, delayed payment has less value than prompt payment in the same amount. Moreover, obtaining money — and the use of it — earlier rather than later has a recognized economic value: in addition to losses from inflation, delayed payment entails a "real opportunity cost of capital." *Library of Congress*, 478 U.S. at 322 n.7 (citing R. Posner, *Economic Analysis of Law* 180 (3d ed. 1986)). As Judge Posner has put it:

> The usual assumption in economics as in life is that a dollar today is worth more than a dollar tomorrow, both because it

can be invested and earn interest and because the future is uncertain.

Heiar v. *Crawford County*, 746 F.2d 1190, 1203 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). Accordingly, this Court has recognized in other contexts that full compensation *must* include compensation for delay in payment. [9/]

These concerns take on special importance for fee awards under Section 1988, because civil rights litigation often takes many years before counsel receive any payment. [10/] A prevailing civil rights plaintiff's lawyer, absent compensation for delay, would receive less compensation — in most cases a great deal less — than he or she could have received doing the same work for a currently-paying client at reasonable market rates. And that result would flatly contravene Congress' objective that these lawyers receive what "is traditional with attorneys compensated by a fee-paying client." Senate Report at 6. A fee award diluted by the passage of time cannot be "fully compensatory." *Hensley*, 461 U.S. at 435.

The legislative history of Section 1988 demonstrates that awards must account for the hardship that results from delayed payment. The Senate Report cited *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), in which this Court upheld an interim fee award and noted:

> To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary. . . .

9/ *Loefler* v. *Frank*, 108 S. Ct. 1965, 1971 (1988) (backpay award under Title VII); *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648 (1983) (damages for patent infringement); *Albrecht* v. *United States*, 329 U.S. 599, 605 (1947) ("just compensation" under Fifth Amendment); *Smyth* v. *United States*, 302 U.S. 329, 353–54 (1937) (same).

10/ *See, e.g., Hutto*, 437 U.S. at 681 (9 years); *Lightfoot* v. *Walker*, 826 F.2d 516, 517 (7th Cir. 1987) (14 years); *Northcross* v. *Board of Educ.*, 611 F.2d 624, 628 (6th Cir. 1979) (19 years), *cert. denied*, 447 U.S. 911 (1980); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 484 (W.D.N.C. 1975) (7 years).

Id. at 723, *cited in* Senate Report at 5. And so, in discussing the timing of awards under Section 1988, the Senate Report stated that "[i]n appropriate circumstances, counsel fees under [Section 1988] may be awarded pendente lite." Senate Report at 5.

If the timing of fee awards must take on flexibility to account for the "substantial hardship" that may result from delayed compensation, then it begs credulity to suggest that the term "reasonable attorney's fee" — which by its nature mandates discretion in the district courts and case-by-case determination, *see Hensley*, 461 U.S. at 429, 437 — must be read to ignore that same hardship.

In applying Section 1988, the lower courts have routinely provided compensation for delay in payment. [11/] As the Fourth Circuit has stated:

> Civil Rights litigation often spans several years, and consequently compensation under § 1988 often occurs long after the relevant services have been rendered. This delay in payment of attorney's fees "obviously dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one".
>
> • • •
>
> Delay necessarily erodes the value of a fee that would have been reasonable if paid at the time the services were rendered. Consequently, an award based upon historic rates which does not take delayed payment into account will not be a fully compensatory fee.

Daly v. *Hill*, 790 F.2d 1071, 1081 (4th Cir. 1986) (quoting *Johnson* v. *University College*, 706 F.2d 1205, 1210 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983)).

11/ *See, e.g., Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945, 951, 955 (1st cir. 1984); *New York State Ass'n for Retarded Children* v. *Carey*, 711 F.2d 1136, 1152 (2d Cir. 1983); *Northcross* v. *Board of Educ.*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Lightfoot* v. *Walker*, 826 F.2d 516, 523 (7th Cir. 1987); *Sisco* v. *J.S. Alberici Constr. Co.*, 733 F.2d 55, 59 n.3 (8th Cir. 1984); *Jordan* v. *Multnomah County*, 815 F. 2d 1258, 1262–63 n.7 (9th Cir. 1987); *Ramos* v. *Lamm*, 713 F.2d 546, 555 (10th Cir. 1983); *Gaines* v. *Dougherty County Bd. of Educ.*, 775 F.2d 1565, 1572 (11th Cir. 1985) (per curiam).

This Court has also recognized the propriety of these approaches, albeit in dictum:

> When plaintiffs' entitlement to attorney's fees depends on success, their lawyers are not paid until a favorable decision finally eventuates, which may be years later, as in this case. Meanwhile, their expenses of doing business continue and must be met. In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by setting the fee based on historical rates to reflect its present value. . . . Although delay and the risk of nonpayment are often mentioned in the same breath, adjusting for the former is a distinct issue that is not involved in this case. We do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute.

Pennsylvania v. *Delaware Valley Citizens Council*, 107 S. Ct. 3078, 3081 (1987) (citations omitted); *see also id.* at 3099 (Blackmun, J., dissenting).

II.

SECTION 1988 AUTHORIZES THE AWARD OF FEES FOR PARALEGALS AT MARKET RATES

In *Blum* v. *Stenson*, 465 U.S. 886 (1986), this Court held that fees under Section 1988 "are to be calculated according to the prevailing mandet rate in the relevent community." *Id.* at 895. Accordingly, the district court in this case awarded Mr. Benson $225,085, and the LDF $431,338, in paralegal and law clerk fees, based on hourly rates of $35 for law clerks (law students), $40 for paralegals and $50 for recent law school graduates. Mr. Benson's law clerks and paralegals had worked 8,108 hours on the case; the LDF's law clerks, paralegals and recent law school graduates had worked 15,517 hours. The court of appeals affirmed the award, saying that "market considerations should govern, but it is not necessary to adopt an ironclad rule in this case." *Jenkins* v. *Missouri*, 838 F.2d 260, 266 (8th Cir. 1988). Numerous other

lower courts have held that market considerations should govern paralegal fees. [12/]

The paralegals in this case performed a variety of tasks that traditional clerical employees could not handle — tasks that would otherwise have fallen to lawyers. The two paralegals whose work made up 80 percent of Mr. Benson's paralegal claim were both college graduates. One had a B.A. in paralegal studies; the other has since graduated from law school. In this litigation, they assisted with document discovery and established the filing system. They interviewed witnesses. They summarized deposition transcripts and exhibits for expert witnesses. They prepared graphs, charts and exhibits for trial. They assisted at trial by logging the exhibits. (Johnson Aff., filed Jan. 16, 1987; Zinn Aff., filed Jan. 16, 1987.)

The State does not dispute that the work of paralegals in this case was reasonably necessary to prosecution of the action and contributed significantly to the result. The State does not dispute that the paralegal rate awarded reflected the market rate in the relevant community; it was in fact "a little bit below" the Kansas City average (Tr. 110). Nevertheless, the State contends that the paralegal work here should be compensated not at "prevailing market rates" — the measure prescribed by this Court, *Blum*, 465 U.S. at 895 — but at "cost." There is no basis for such a result.

12/ *See, e.g., Spanish Action Comm.* v. *City of Chicago*, 811 F.2d 1129, 1138 (7th Cir. 1987); *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d 43, 54 & n.7 (D.C. Cir. 1987) (30 U.S.C. § 1270), *vacated in part on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988); *Ramos* v. *Lamm*, 713 F.2d 546, 558-59 (10th Cir. 1983); *Richardson* v. *Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983) (Title VII) *cert. denied*, 464 U.S. 1009 (1983); *Northcross* v. *Board of Educ.*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Vaughns* v. *Board of Educ.*, 598 F. Supp. 1262, 1283 (D. Md. 1984), *aff'd*, 770 F.2d 1244 (4th Cir. 1985); *Feher* v. *Department of Labor & Indus. Relations.*, 561 F. Supp. 757, 766 (D. Hawaii 1983).

A. The Result the State Seeks Would Undermine the Purpose of Section 1988

Separate billing for paralegals is an "increasingly widespread custom" in the legal community. *Ramos* v. *Lamm*, 713 F.2d 546, 558 (10th Cir. 1983). [13]/ And the record in this case confirms that the custom is to bill for that time at rates governed by market considerations, not at "cost." The evidence includes a 1986 Survey of Law Firm Economics, containing 1985 data (Pl. Ex. 4). That survey shows that, in metropolitan areas with populations over one million like Kansas City, paralegals' time was billed at an average hourly rate of $44 (*id.* at 58). But these paralegals were paid an average of $26,049 annually, including benefits, for an average of 1,355 billable hours, or $19.22 per billable hour (*id.* at 79, 129).

The legislative history of Section 1988 suggests strongly that compensation for the work of paralegals in civil rights cases should follow the custom of the market. The purpose of the statute is to promote effective private enforcement of the civil rights laws by "attract[ing] competent counsel in cases involving civil and constitutional rights." House Report at 9. And to accomplish this, Congress determined to provide awards similar to what "is traditional with attorneys compensated by a fee-paying client." Senate Report at 6. Thus, in *Blum*, the Court specifically rejected an argument, like the State's here, that fees under Section 1988 should "be calculated according to the cost of providing legal services rather than according to the prevailing market rate." 465 U.S. at 892.

---

[13]/ The State notes that one of plaintiffs' witnesses, Kansas City attorney Max Foust, testified that he "does not bill separately for paralegal services" (Pet. Br. 6 n.5). Mr. Foust's custom, however, is irrelevant, since at least 90 percent of his current practice is based on contingent fee contracts (Tr. 61) — that is, he charges his clients a package price. He averages $400–$500 an hour for his time on these packages, and so doubtless can afford to throw in paralegals (*id.* at 79). Significantly, Mr. Foust testified that Kansas City law firms that bill on a per diem basis regularly charge between $40 and $50 an hour for paralegal services (*id.* at 67).

By definition, a lawyer can obtain from a paying client "the prevailing market rates in the relevant community" for the work of paralegals he or she employs. To hold that lawyers must receive less when they prevail in civil rights litigation is to discourage such litigation. And a prevailing civil rights lawyer denied market-based compensation for the work of paralegals cannot obtain what he or she could have received from a paying client.

A lawyer negotiating with a paying client has the option of either billing for paralegals at market rates or billing for that work at some approximation of cost, and raising his or her own hourly fee to achieve the same total compensation. Prevailing counsel in civil rights cases, however, do not have the latitude to negotiate a reallocation of their income between paralegal time and their own, because their own hourly rates must by law derive from the prevailing market rates. Denied market-based compensation for paralegal work, a prevailing civil rights lawyer would be unable to approximate the overall fee available from a paying client for comparable work. The purpose of Section 1988 would be undermined.

More specifically, the legislative history indicates that Congress approved of fee awards for paralegal work, calculated separately at hourly rates, and there is no indication that Congress intended such awards to be governed by anything other than market standards. The Senate Report cited three cases that "correctly applied" the "appropriate standards" set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). [14]/ (The Court, also, has recognized that these cases provide the benchmark of Congress' intent. *Blum*, 465 U.S. at 894; *Hensley*, 461 U.S. at 430–32.) In one of the cases cited by the Senate Report, the court had awarded $10 an hour for "statistical analysis, legal research, transcript summarization, interviewing, and general assistance carried out by a law clerk and a

---

[14]/ Senate Report at 6 (citing *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 Fair Empl. Prac. Cas. (BNA) 244, 8 Empl. Prac. Dec. (CCH) ¶ 9444 (C.D. Cal. June 5, 1974); *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 66 F.R.D. 483 (W.D.N.C. 1975)).

paralegal assistant." *Davis* v. *County of Los Angeles*, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048 (C.D. Cal. June 5, 1974). Although *Davis* did not state that the $10 rate was based on market rates, there is certainly no indication to the contrary. [15/] As this Court noted in *Blum*, the fee awards in *Davis* and the other cases cited by the Senate Committee "were calculated according to prevailing market rates. None of these four cases made any mention of a cost-based standard." 465 U.S. at 894 (footnotes omitted).

In all events, the "widespread custom" is, by definition, to charge for paralegals at market rates. If it were the practice in some community to charge "cost," that is precisely what the market would reflect. To single out prevailing civil rights lawyers, however, and to limit them to "cost" regardless of the custom in the relevant community, is to contravene the very essence of Section 1988, and to send civil rights plaintiffs to the back of the bus.

B. The Result the State Seeks Would Increase the Costs of Litigation

In recent years, with the increasing scope, complexity and expense of civil litigation generally, paralegals (or "legal assistants") have become an ever more familiar presence in the practice of law. Under the supervision of lawyers, they assist in the delivery of legal services by performing a variety of tasks that need not occupy the more costly time of lawyers, but require training, experience or ability different from those of other customary non-lawyer employees. The National Association of Legal Assistants, Inc., has characterized their function as follows:

> Legal assistants are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

Model Standards and Guidelines for Utilization of Legal Assistants (NALA 1984).

The legal profession recognizes the importance of paralegals. The American Bar Association has a Standing Committee on Legal Assistants. And the use of paralegals is widespread. According to the 1986 Survey of Law Firm Economics, law firms employed an average of one paralegal for every five lawyers in 1995, nationwide (Pl. Ex. 4 at 17). The United States Department of Labor has projected that the number of legal assistants will double from 53,000 in 1984 to 104,000 by 1995. Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Quarterly* (Spring 1986).

While paralegals naturally perform only those tasks that need not be performed by a lawyer, many of their tasks would fall to lawyers in the absence of paralegals, since the tasks fall between the skill levels of lawyers and non-legal employees. In consequence, the use of paralegals saves money. As discussed above, the paralegals in this case interviewed witnesses, digested discovery materials, prepared exhibits and assisted at trial. (*See supra* p. 27.) The courts have recognized that these are not clerical tasks. [16/] In the absence of paralegals, they would be performed by lawyers, at higher hourly rates.

[15/] To the extent any inference is possible, it is hard to conceive that a rate of $10 an hour in 1974 was derived in any manner comparable to that by which the State here calculated its proposed $15 rate more than a decade later. Moreover, the court in *Davis* awarded fees for work by attorneys at rates ranging from $35 to $60 an hour, the latter for an "able and experienced litigator." 8 Fair Empl. Prac. Cas. (BNA) at 245, 8 Empl. Prac. Rec. (CCH) ¶ 9444, at 5048. Those rates bear about the same relationship to the $10 rate for paralegals as do the rates awarded for attorneys to those for paralegals in this case.

[16/] *See, e.g., Richardson* v. *Byrd*, 709 F.2d 1016, 1023 (5th Cir. 1983) (paralegals "assisted the lawyers at trial" and "participated in telephone conferences with lawyers [and] witnesses"), *cert. denied*, 464 U.S. 1009 (1985); *Spray-Rite Serv. Corp.* v. *Monsanto Co.*, 684 F.2d 1226, 1250 (7th Cir. 1982) ("digesting and indexing discovery and trial materials"), *aff'd*, 465 U.S. 752 (1984); *Easter House* v. *Illinois Dep't of Children & Family Serv.*, 663 F. Supp. 456, 460 (N.D. Ill. 1987) ("organizing and compiling exhibits").

Accordingly, as courts have also recognized, "paralegal and law clerk personnel provide necessary services which, were they performed by attorneys, would be more costly." *Keith* v. *Volpe*, 501 F. Supp. 403, 413 (C.D. Cal. 1980); *see also Garmong* v. *Montgomery County*, 668 F. Supp. 1000, 1011 (S.D. Tex. 1987). And therefore, the use of paralegals "is to be encouraged by separate compensation in order to reduce the time of more expensive counsel." *Jacobs* v. *Mancuso*, 825 F.2d 559, 563 (1st Cir. 1987). Compensating for the work of paralegals as part of attorney's fees under Section 1988 "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes". *Cameo Convalescent Center, Inc.* v. *Senn*, 738 F.2d 836, 846 (7th Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

To compensate for paralegal work at anything less than market, however, is to discourage the use of paralegals and thus to discourage the cost-effective delivery of legal services. A potential civil rights lawyer who cannot be awarded a market rate for paralegals must either:

(a) forego civil rights work in favor of work for clients who will pay market for paralegals;

(b) accept civil rights cases, knowing that, regardless of the results obtained, he or she will receive less income than from a paying client; or

(c) accept civil rights work but use attorneys, at significantly higher hourly rates, to perform the chores that paralegals could do.

None of these alternatives is acceptable. The first would eviscerate the very purpose of Section 1988. The second is precisely the one that Section 1988 is meant to avoid. The third would make the litigation more costly for all concerned.

C. The State's Arguments Are Without Merit

Against all this, the State raises a number of arguments, each of which disintegrates under scrutiny.

First, the State contends that Congress did not specifically consider paralegal compensation in enacting Section 1988 (Pet. Br. 26). That statement, of course, is belied by the Senate Report's citation to *Davis* (*see supra* pp. 29-30). Even if the State were correct, however, the argument would prove nothing, for the standard under Section 1988 is the market and, in today's practice of law, paralegal fees are undeniably a part of attorney's fees customarily collected. A lack of specific consideration of paralegals by Congress would not suggest that their work should be compensated by some standard peculiar to them.

Second, the State contends that compensating for paralegal time at market rates produces a "windfall" for prevailing counsel because those market rates have "a built in profit factor within them" (Pet. Br. 26). Other than the State's *ipse dixit*, however, there is no reason to equate a market-determined rate with a "windfall." Partners in law firms — including those who earn fees under Section 1988 — ordinarily obtain a profit on the work of the attorneys they employ. The State does do not suggest there is anything improper about this. And there is nothing extraordinary about lawyers earning a profit on the work of the paralegals they employ as well — they customarily do so.

Profit from the work of employees is fundamental to any enterprise in our society. A partner in a law firm, like the owner of any business enterprise, is responsible for the activities of his or her employees in the scope of their employment. It is the partners in a law firm, again like the owners of any business, who bear the risk that fees will not be paid at all. And there is nothing novel or untoward about compensating them for responsibility and risk. To the contrary, the cost-based limit that the State seeks to impose would produce a "wind-

fall" for it: the State would pay only a small fraction of the amount charged a paying client for comparable paralegal services.[17]/

Third, the State argues that its proposed amendment to Section 1988 would make "costs easier to calculate" (Pet. Br. 27). The State cannot be serious. It takes little imagination to perceive the difficulties district courts would encounter in trying to apportion rent, secretarial salaries and benefits, equipment and the other components that make up overhead. By contrast, the market rates awarded here were proved by uncontroverted testimony and extensive, readily available studies. Their calculation involved no difficulty whatsoever.

The State deliberately chose neither to proffer evidence nor to conduct discovery needed to calculate the "costs" of paralegals. Now the State wants a remand to do what it should have done; or it wants this Court to adopt a $15 number plucked from the air. There is no reason to do either.

Fourth, the State suggests that paralegals' work should be compensated at cost because the paralegals here were hired specifically for this litigation (Pet. Br. 27). But nothing in the language, legislative history or policies of Section 1988 suggests such a distinction. [18]/ A fee-paying client could hardly avoid paying market rates for paralegal work simply because the paralegals involved were hired specifically for his or her case. And under the market standards articulated by this Court, that is dispositive.

---

[17]/ According to the 1986 Survey of Law Firm Economics, the average 1985 billing rate for paralegals in the west-central region of the nation, which includes Kansas City, was $42 an hour (Pl. Ex. 4 at 52). For 73 percent of the paralegals surveyed in the region, their time was billed at or above the $40 an hour awarded here (*id.*). In metropolitan areas with populations greater than one million, the average billing rate for paralegals was $44 an hour (*id.* at 58). Sixty-five percent of the paralegals surveyed in such areas generated fees at or above $40 an hour (*id.*).

[18]/ The State purports to base this approach on *Lamphere* v. *Brown University*, 610 F.2d 46 (1st Cir. 1979). That case, however, involved paralegals "not regularly" in counsel's employ, who had "volunteered a good deal of their time." *Id.* at 48. The court expressly stated that its opinion "does not relate to salaried paralegals in counsel's own office", such as the paralegals in this case. *Id.* at 48 n.3; *see Jacobs* v. *Mancuso*, 825 F.2d at 563.

In sum, to accept the State's cost-based approach to paralegal fees would send an unseemly — and costly — message to all lawyers: "If you need help on a civil rights case, use more lawyers, not paralegals."

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JAY TOPKIS
DANIEL J. LEFFELL
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON*
99 Hudson Street
New York, New York 10013
(212) 219-1900

ARTHUR A. BENSON, II
BENSON & MCKAY
911 Main Street,
Suite 1430
Kansas City, Missouri 64105
(816) 842-7603

RUSSELL E. LOVELL, II
3111 40th Place
Des Moines, Iowa 50310
(515) 271-3985

THEODORE M. SHAW
634 S. Spring Street
Los Angeles, California 90014
(213) 624-2405

Attorneys for Respondents

*Counsel of Record

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-64

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

WILLIAM L. WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
Supreme Court Building
Jefferson City, Missouri 65102
(314) 751-3321

MICHAEL L. BOICOURT*
Assistant Attorney General
BRUCE FARMER
BART A. MATANIC
Assistant Attorneys General
Counsel for Petitioners

*Counsel of Record

E. L. MENDENHALL, INC., 920 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

ARGUMENT—

I. THE ELEVENTH AMENDMENT PROHIBITS COMPENSATION FOR PREJUDGEMENT INTEREST 1

A. Eleventh Amendment Immunity Is Equivalent to Common-Law Sovereign Immunity 2

B. Prejudgement Interest Is Not a Component of Costs 6

II. SECTION 1988 DOES NOT AUTHORIZE THE AWARD OF FEES FOR PARALEGALS AT MARKET RATES 13

A. There Is No Statutory Authorization for Such an Award 13

B. Plaintiffs' Policy Arguments Fail Under the Facts of This Case 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 14, 15
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 5, 13
Bradley v. Richmond School Board, 416 U.S. 696 (1974) 10
Chisholm v. Georgia, 2 Dall. (2 U.S.) 419 (1793) 2, 3
City of Riverside v. Rivera, 477 U.S. 561 (1986) 15
Cory v. White, 457 U.S. 85 (1982) 11
Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cas. (BNA) 244, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048 (C.D. Cal. June 5, 1974) 14
Edelman v. Jordan, 415 U.S. 651 (1974) 5, 12
Evans v. Jeff D., 475 U.S. 717 (1986) 8
Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945) 11
Green v. Mansour, 474 U.S. 64 (1985) 8
Hans v. Louisiana, 134 U.S. 1 (1890) 1, 2, 4, 5
Hensley v. Eckerhart, 461 U.S. 424 (1983) 17
Hutto v. Finney, 437 U.S. 678 (1978) 5, 11
In re Chicken Antitrust Litigation, 560 F.Supp. 963 (N.D. Ga. 1980) 15
Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) 15
Kentucky v. Graham, 473 U.S. 159 (1985) 5
Library of Congress v. Shaw, 478 U.S. 310 (1986) ..... passim
Missouri v. Fiske, 290 U.S. 18 (1933) 4

Monaco v. Mississippi, 292 U.S. 313 (1934) 2
Nevada v. Hall, 440 U.S. 410 (1979) 3
Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) (Pennhurst II) 4, 5, 12
Platoro Limited, Inc. v. Unidentified Remains of a Vessel, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983) 12
Quern v. Jordan, 440 U.S. 332 (1979) 5
Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) 15
Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987) 11
Welch v. Texas Department of Highways and Public Transportation, 107 S.Ct. 2941 (1987) 4

Constitutional Provisions:

Eleventh Amendment ..... passim

Statutes:

42 U.S.C. § 1988 ..... passim
42 U.S.C. § 2000e-5(k) 6

Legislative Materials:

S.Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 ..... 7, 15

I

THE ELEVENTH AMENDMENT PROHIBITS COMPENSATION FOR PREJUDGEMENT INTEREST.

Petitioners (hereinafter the "State") file this reply brief to address the arguments presented by both the respondents (hereinafter the "Plaintiffs") and the *amicus curiae*.

In support of their position that the Eleventh Amendment does not bar prejudgement interest or compensation for delay, plaintiffs call into question this Court's previous Eleventh Amendment decisions. While plaintiffs expressly ask the court to overrule *Hans v. Louisiana*, 134 U.S. 1 (1890) (Resp. Br. 19-21), adoption of plaintiffs' position, short of reversal, would still require the court to repudiate a long-standing line of Eleventh Amendment decisions. Plaintiffs' position would also require the court to find that a State's sovereign immunity, embodied in the Eleventh Amendment, is entitled to less deference and is more easily abrogated than the sovereign immunity available to the United States.

Plaintiffs also take the position that this Court's Eleventh Amendment decisions do not apply in analyzing the scope of a statutory enactment applicable to the States. This position, however, is inconsistent with the analysis used by this Court in *Library of Congress v. Shaw*, 478 U.S. 310 (1986). As shown below, plaintiffs' argument is legally deficient because it necessarily depends on the principle that prejudgement interest or compensation for delay is included within the terms of 42 U.S.C. § 1988.

A. Eleventh Amendment Immunity Is Equivalent to Common-Law Sovereign Immunity.

Plaintiffs' position requires this Court to find that the constitutionally-based immunity enjoyed by the states is inferior to the common-law sovereign immunity of the United States. Plaintiffs argue that there is "no reason to assume that immunity under the Eleventh Amendment is coextensive with the sovereign's common-law immunity from suit in its own courts." Resp. Br. 16. Plaintiffs' position, however, reflects a fundamental misunderstanding of the basis of the Eleventh Amendment and the importance of this principle in our constitutional jurisprudence.

The origins of the Eleventh Amendment are well known. In *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793), this Court assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. The decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco v. Mississippi*, 292 U.S. 313, 325 (1934).

Justice Iredell's dissenting opinion in *Chisholm v. Georgia*, is generally regarded as embodying the rationale of the Eleventh Amendment. See *Hans v. Louisiana*, 134 U.S. 1, 12 (1890). This is significant because Justice Iredell traced the origin of the states' sovereign immunity to the common law as it existed in England. Thus, contrary to plaintiffs' implication (Resp. Br. 15-16), the United States' sovereign immunity and the individual state's sovereign immunity are derived from the same common-law origins.

Justice Iredell's dissenting opinion in *Chisholm v. Georgia* contains an extensive discussion of the common

law of England as the basis of the immunity possessed by the states.

> Now I presume it will not be denied, that in every State in the *Union*, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State, were those which in *England* apply to claims against the crown . . . .

2 Dall., at 437.[1] See also *id.* at 435 ("'the common law' . . . is the ground-work of the laws in every State in the *Union* . . . *as it existed in England*") (emphasis in original); *id.* ("the *United States* have no claim to any authority but such *as the States have surrendered to them*") (emphasis in original).

Admittedly, Justice Iredell's dissenting opinion is in the context of a case that did not involve a federal question. On the constitutional question, however, Justice Iredell intimated a view consistent with more recent decisions of this Court:

> So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, *under any circumstances*, a compulsive suit against the State for the recovery of money.

2 Dall., at 449 (emphasis added).

---

1. Compare this passage with plaintiffs' description of the basis of the United States' sovereign immunity: "Since the King was at the apex of the federal pyramid, there was no higher court in which he could be sued." Resp. Br. 15, citing *Nevada v. Hall*, 440 U.S. 410, 415 (1979).

Thus, relying heavily on Justice Iredell's dissent, this Court's unanimous decision in *Hans v. Louisiana* firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity. The Amendment is a "specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 120 (1984) ("Pennhurst II") (emphasis in original). See also *Missouri v. Fiske*, 290 U.S. 18, 26 (1933) (Eleventh Amendment prohibits suit against state even though controversy arises under constitution or laws of United States).

While the need to vindicate federal rights is important, this Court has emphasized that "the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst II*, 465 U.S. at 105. More importantly, this Court has recently declared that "the fundamental principle enunciated in *Hans* has been among the most stable in our constitutional jurisprudence." *Welch v. Texas Department of Highways and Public Transportation*, 107 S.Ct. 2941, 2952 (1987).[2]

Therefore, there is no basis for plaintiffs' implication that Eleventh Amendment immunity is an inferior doctrine and entitled to less deference. While Congress has the authority to waive the United States' sovereign immunity and abrogate the states' Eleventh Amendment immunity, the standards established by this Court are legally indistinguishable.

---

2. For this reason, plaintiffs' request that *Hans v. Louisiana* be overruled should not be considered. *Welch* notes that the "general principle of state sovereign immunity has been adhered to without exception by this Court for almost a century." *Welch*, 107 S.Ct. at 2956. To reconsider almost one hundred years of jurisprudence in the context of this case is not appropriate due to the complexity of the issue. *Welch*, 107 S.Ct. at 2958 (Scalia, J., concurring).

In *Library of Congress*, the United States' immunity with respect to interest was upheld. This Court noted that waivers of immunity must be construed "strictly in favor of the sovereign" and emphasized that a waiver requires an "*affirmative* congressional choice." 478 U.S. at 318, 319 (emphasis added).

Arguably, this Court's Eleventh Amendment decisions set forth an even more rigorous standard. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985), held "that Congress must express its intention to abrogate the Eleventh Amendment in *unmistakable* language *in the statute itself*." *Pennhurst II* emphasizes that a waiver requires "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" 465 U.S. at 99, citing *Quern v. Jordan*, 440 U.S. 332 (1979).[3]

The Eleventh Amendment is generally recognized as a constitutional limitation on the *type* of relief available against a state. See discussion in *Kentucky v. Graham*, 473 U.S. 159, 165-71 (1985). See also *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law). While there may be reasonable policy reasons for an award of prejudgement interest or compensation for delay, policy alone is insufficient to defeat the State's constitutional immunity. *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment").

---

3. This Court's recent Eleventh Amendment decisions call into question the validity of the holding in *Hutto v. Finney*, 437 U.S. 678 (1978). See Pet. Br. 18 n.10. If a reconsideration of Eleventh Amendment principles is undertaken, then the State suggests that *Hutto v. Finney* is more of an aberration than *Hans v. Louisiana*.

B. Prejudgement Interest Is Not a Component of Costs.

Plaintiffs claim that this Court's Eleventh Amendment decisions have "no bearing" on the consideration of "the scope" of § 1988. Resp. Br. 6. See also Resp. Br. 11 (Eleventh Amendment decisions do not "apply in determining the *scope* of a statute") (emphasis in original). Thus, plaintiffs conclude that the "stringent standards for abrogation set forth in this Court's Eleventh Amendment decisions do not address litigation *costs*." Resp. Br. 6 (emphasis added).

Ignoring the clear holding of *Library of Congress*, plaintiffs repeatedly emphasize this point. See, e.g., Resp. Br. 10 ("The states do not enjoy any Eleventh Amendment immunity from *costs* comparable to the sovereign immunity of the federal government"); *id.* ("interest on *costs* is fairly only a part of *costs*"); *id.* at 13 ("Congress has by statute given the federal courts jurisdiction to entertain applications for *costs, including attorney's fees,* against the states") (emphasis added).

Consequently, the logical conclusion of plaintiffs' argument is that *Library of Congress* was wrongly decided. While discussed in more detail in the State's opening brief, *Library of Congress* considered the fee-shifting provision of Title VII. The statute allowed "a reasonable attorney's fee as part of the costs" and provided that the United States was liable "for costs the same as a private person." § 706(k) of Title VII, 42 U.S.C. § 2000e-5(k). *Library of Congress* held that prejudgement interest or compensation for delay was not included within the *scope* of this statute.

Specifically, this Court held that the term "reasonable attorney's fees" did not include interest as a component. 478 U.S. at 320. The court also emphasized that while the term "costs" included a reasonable attorney's fee, prejudgement interest was not a component of "costs". *Id.* at 321. In unambiguous language even plaintiffs cannot ignore, the court stated that "the term costs has never been understood to include any interest component." *Id.*

Thus, plaintiffs' position would require this Court to ignore the clear holding of *Library of Congress*. Section 1988 contains the identical phrases analyzed in *Library of Congress*. The legislative history of § 1988 notes its reliance on the "language of Title[] . . . VII of the Civil Rights Act of 1964." S.Rep. No. 94-1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5910. The identical language in both statutes is "a reasonable attorney's fee as part of the costs."

Plaintiffs' position requires this Court to apply inconsistent meanings to identical statutory terms. To illustrate, plaintiffs ask this Court to find that the term "reasonable attorney's fee" includes an element of prejudgement interest or compensation for delay in a fee award under § 1988 when *Library of Congress* specifically held that the fee-shifting provision of Title VII did not include such an element. Plaintiffs further ask the court to find that the term "costs" includes an element of prejudgement interest or compensation for delay when fees are awarded under § 1988 even though *Library of Congress* rejected the argument that "costs" under Title VII includes an element of prejudgement interest or compensation for delay. Neither law nor logic support plaintiffs' position.

In an attempt to avoid the logical application of *Library of Congress*, plaintiffs set forth numerous policy

reasons why compensation for delay should be allowed. Plaintiffs argue that "first-quality lawyers" cannot be attracted to civil rights cases "without compensation for delay." Resp. Br. 22. Plaintiffs contend that fee awards under § 1988 must be similar to what is traditional with attorneys compensated by a fee-paying client, *id.* at 23, and that "substantial hardship" would result from delayed compensation. *Id.* at 21-26.

Initially, it must be noted that the hardship caused by delay in payment has been greatly exaggerated by plaintiffs throughout this fee litigation. The fee award in this case involved attorneys who worked on the case from 1979 through June 30, 1986. Arthur Benson and his staff entered their appearance in 1979 and the NAACP Legal Defense Fund (LDF) entered their appearance in 1982 (J.A. 2). The plaintiffs became prevailing parties in this litigation on September 17, 1984, when the district court entered its order finding the State defendants and the Kansas City, Missouri School District (KCMSD) liable (Pet. App. A171-A215). The first fee application, however, was not filed until almost seventeen months later in February, 1986 (J.A. 12). Thus, interim fees were not requested at the point where plaintiffs became prevailing parties.

Plaintiffs' claim of financial hardship on the attorneys[4] involved loses its force in light of the delay in filing fee applications. Further, plaintiffs' argument does

4. In *Evans v. Jeff D.*, 475 U.S. 717, 730 n.19, 731-32 (1986) this Court made clear that "Congress bestowed on the 'prevailing *party*' (generally plaintiffs) a statutory eligibility" for § 1988 attorney's fees and, correspondingly, that Congress did not intend to vest the right to statutory fees in the prevailing party's attorney. In the case at bar, there is nothing in the record to suggest that the party plaintiffs suffered any hardship as a result of delay in payment.

not withstand scrutiny when considering the time period when most of the services were incurred. The district court ordered reimbursement for approximately 18,083 hours of attorney time (Pet. App. A42-A43). This does not include fees incurred in litigating the fee applications. Extrapolating from the fee applications, the hours compensated per year break down as follows:

Year	Hours Compensated
1979	163
1980	60
1981	126
1982	889
1983	9,173
1984	6,510
1985	1,129
1986 (June 30)	33
TOTAL	18,083

Approximately 86.7% of the hours compensated were incurred in 1983 and 1984, within two years of the date plaintiffs became prevailing parties.[5] Viewed in this light, plaintiffs have clearly exaggerated any hardship caused by delay in payment.

In any event, the policy arguments presented by plaintiffs apply in equal force to Title VII cases and were considered and rejected in *Library of Congress*. There, the lower court had indicated that increasing an attorney's

5. These numbers and the numbers in the table are approximations and extrapolated from the fee applications. The fee applications and responses thereto are part of the record and identified in the Joint Appendix as docket numbers 1154, 1156, 1191, 1199, 1200, 1201, 1223, 1283 (J.A. 12-16).

fee award for delay is appropriate because the hourly rate used for the lodestar represents the prevailing rate for clients who typically pay their legal bills promptly and court-awarded fees are normally received long after legal services are rendered. 478 U.S. at 313. The lower court concluded that an increase for delay is designed to compensate the attorney for the money he could have earned had he been paid earlier and invested the funds. *Id.* *Library of Congress* acknowledged that policy reasons can be compelling, but found that policy is insufficient to waive a sovereign's immunity. *Id.* at 320-21.

Plaintiffs' argument is that the policy reasons behind Congress' enactment of § 1988 necessarily requires that the statute be interpreted to include prejudgement interest or compensation for delay. Compare plaintiffs' position to the argument rejected in *Library of Congress*:

> Respondent argues, however, that the policy reasons that motivated Congress to permit recovery of a *reasonable* attorney's fee require reading the statute as a waiver of immunity from interest.

478 U.S. at 320-21 (emphasis in original). The policy reasons advanced by plaintiffs are not sufficient to overcome the State's immunity and should be addressed to Congress.

Plaintiffs also claim that the legislative history of § 1988 supports their position. Plaintiffs note that the Senate Report cited *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), a desegregation case in which this Court upheld an interim fee award. Cited in Senate Report at 5. Plaintiffs also note that the Senate Report stated that in "appropriate circumstances, counsel fees under [§ 1988] may be awarded pendente lite." Resp. Br. at 25, citing Senate Report at 5.

Plaintiffs' analysis, however, was specifically considered and rejected in *Rogers v. Okin*, 821 F.2d 22 (1st Cir. 1987). The First Circuit indicated that the mention of interim fees in the legislative history of § 1988 actually supports the position that prejudgement interest or compensation for delay is not available under the statute. The First Circuit concluded:

> The specific mention of the possibility of interim fee awards to cushion the burden on plaintiffs seem to us to cut against any implication that the alternative approach of prejudgement interest was contemplated.

821 F.2d at 27.

Plaintiffs also argue that Eleventh Amendment immunity depends on a "retroactive-prospective distinction" and that an award of costs is a portion of the expenses incurred in seeking prospective relief. Resp. Br. at 8, citing *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978). Again, plaintiffs' argument depends on a finding that prejudgement interest or compensation for delay is an element of "costs." Notwithstanding this problem, plaintiffs' "retroactive-prospective distinction" does not survive scrutiny.

Plaintiffs' claim is that litigation costs are not part of the "retroactive liability for prelitigation conduct" prohibited by the Eleventh Amendment. Resp. Br. 6. As noted above, however, *Library of Congress* specifically held that prejudgement interest or compensation for delay is not "costs", but rather an element of "damages."

Damages, however, are compensatory and are clearly barred by the Eleventh Amendment. See, e.g., *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945); *Cory v. White*, 457 U.S. 85, 90 (1982). Pre-

judgement interest or compensation for delay is not part of prospective relief. Prospective relief refers to relief granted from the date of the judgement. Thus, for example, the Eleventh Amendment would bar retroactive payment of welfare benefits found to have been wrongfully withheld, but would not bar a judgement requiring prospective compliance. *Edelman v. Jordan*, 415 U.S. 651 (1974).[6]

What plaintiffs seek to recover herein, however, is interest or compensation for delay for the time period before the judgement. In effect, plaintiffs seek compensatory relief for interest or "damages." As *Library of Congress* cautions, a party may not avoid sovereign immunity and seek interest or damages for delay simply by attaching another label to the term. 478 U.S. at 321-22 ("no-interest rule cannot be avoided simply by devising a new name for an old institution").[7]

In their brief, plaintiffs attempt to find support for their position in a state statute that authorizes awards of prejudgement interest in state court. Resp. Br. 17. The State's "constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst II*, 465 U.S. at 99. The question of waiver is a matter of federal law and the court has

---

6. To carry plaintiffs' argument to its logical conclusion, the plaintiffs in *Edelman* should have been able to collect interest on the welfare benefits wrongfully withheld even though the Eleventh Amendment barred recovery of the welfare payments.

7. Plaintiffs' citation to *Platoro Limited, Inc. v Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), is not persuasive. There, the court found a waiver of Eleventh Amendment immunity. *Id.* at 901. The court noted, however, that prejudgement interest is "compensatory." *Id.* at 906 n.20. Unlike *Platoro*, in cases where the state has not waived its Eleventh Amendment immunity, "compensatory" liability is barred.

established a "stringent" test for finding that a state has waived its immunity from federal court jurisdiction. *Atascadero*, 473 U.S. at 241. There is nothing in the record to suggest that the State has unequivocally waived its federal court immunity on this issue.

The arguments presented in plaintiffs' brief are inconsistent with a long line of Eleventh Amendment decisions by this Court. The doctrine of sovereign immunity, as embodied in the Eleventh Amendment, is an important part of our federal system and reflects the Framers' careful allocation of responsibility among the state and federal judiciaries. Plaintiffs' position would undermine the logic of the constitutional scheme and repudiate almost a hundred years of Eleventh Amendment jurisprudence.

II

SECTION 1988 DOES NOT AUTHORIZE THE AWARD OF FEES FOR PARALEGALS AT MARKET RATES.

Plaintiffs and *amicus curiae* raise essentially the same arguments. They seek a market-based rule for paralegal services that, at least in this case, is five, six or even seven times the actual cost. Without any statutory authority, plaintiffs and *amicus* equate paralegal services with attorney services. In this particular case, however, the paralegals were an expense, employed specifically for this case. Under such circumstances, there is no legal basis for plaintiffs' position that Congress implicitly approved a profit-producing market approach to this type of expense.

A. There Is No Statutory Authorization for Such an Award.

There is simply no statutory authorization for the award of paralegal fees at market rates. The statute is

silent on that subject, as it is silent on the question of secretary fees or messenger fees. Plaintiffs by and large do not dispute that the statute does not contain any explicit authorization for the award of paralegal fees at market rates. There is no mention of the landmark case of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), or any discussion of the normal rules of statutory interpretation in the section of their brief which concerns the paralegal issue.

It should be clear that the State is not suggesting that the paralegal expenses in this case should not be separately compensated. A reasonable argument could be made that Congress did not consider this issue and such services are part of office overhead. In the narrow context of this case, however, the State seeks only to limit reimbursement to the actual cost of paralegal services.

Plaintiffs do not dispute that the statute is silent on this issue. Plaintiffs point to an oblique reference in the legislative history to a single case—*Davis v. County of Los Angeles*, 8 Fair Empl. Prac. Cas. (BNA) 244, 246, 8 Empl. Prac. Dec. (CCH) ¶ 9444, at 5048 (C.D. Cal. June 5, 1974). There, a $10 hourly rate was awarded to a law clerk and a paralegal assistant. Plaintiffs concede that there is no indication that the $10 rate was based on market rates. Resp. Br. 30.

On the basis of a passing reference to *Davis*, plaintiffs justify recovery from the taxpayers of almost $400,000 in profit on their paralegal expenses.[8] *Davis*, however, is cited by Congress only for its correct application of the

8. The district court's May 11, 1987, fee order awarded almost $650,000 to plaintiffs' attorneys for paralegal services (Pet. App. A42-A43). If the hourly rate was limited to $15, as suggested by the State, the paralegal award would have been approximately $250,000.

factors in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)—factors that concern calculation of the *attorney's* fee.

Clearly, Congress never specifically considered this issue. Section 1988 was enacted in 1976 as a reaction to this Court's opinion in *Alyeska*. See *City of Riverside v. Rivera*, 477 U.S. 561, 567 (1986). At that time, lawyers rarely, if ever, billed separately for paralegal services.

The *amicus* brief actually supports the State's argument by noting that separate billing for paralegal services is a post-§ 1988 occurrence.

> In the not so distant past the court would have frowned upon the practice of billing paraprofessional time separate from attorney time just as it might if a firm separately recorded and billed the hours spent by a secretary on a specific client . . . .

Amicus Br. 7, citing *In re Chicken Antitrust Litigation*, 560 F.Supp. 963, 977-78 (N.D. Ga. 1980). See also *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir. 1983) (separate billing is an "increasingly widespread custom").

Had Congress actually considered the issue, it is by no means clear how they would have reconciled the competing policy interests. While Congress intended to encourage lawyers to handle civil rights cases, Congress specifically warned that "fees [should] not produce windfalls to attorneys." See S.Rep. No. 94-1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News, 5908, 5913.

The result urged by plaintiffs is contrary to this concern by Congress. If paralegal expense is reimbursed at a rate many times the actual cost, will attorneys next try

to bill separately—and at a profit—for such items as secretarial time, paper clips, electricity, and other expenses?

This is not a theoretical example. In this very case, plaintiffs' attorneys received separate reimbursement—albeit probably not on a profit basis—for such items as office rent, electricity, car repair, typewriter rental, file cabinets, file storage, local counsel travel expenses, local parking, office supplies, telephone equipment, office furniture, computer rental, office stationery, house rent, rented furniture for house, gas and electricity for rental house, and maid service for rental house.[9] These items are generally thought to be part of office overhead included in the normal hourly rate.

What is happening is that fee-seeking attorneys are separating every single item possible for separate reimbursement and then expecting their normal hourly rate. The State submits that Congress would not validate such a practice. While plaintiffs and *amicus* set forth numerous policy reasons for their position, such arguments should be addressed to the legislative body.

B. Plaintiffs' Policy Arguments Fail Under the Facts of This Case.

Plaintiffs and *amicus* argue that reimbursing the actual cost of paralegal services would undermine the purpose of § 1988, increase the cost of litigation, and encourage lawyers to do paralegal work. Regardless of the validity of those arguments in general, these policy reasons have no bearing on the particular facts of this

9. See expenses detailed in plaintiffs' fee applications: Motion for Partial Award of Attorneys' Fees and Expenses, Attachment C, filed February 5, 1986 (Docket No. 1154 (J.A. 12)) (Benson Application); Motion for Partial Interim Award of Attorneys' Fees and Expenses, Appendices D, D-1, E, filed February 11, 1986 (Docket No. 1156 (J.A. 12)) (LDF Application).

case. The attorneys for plaintiffs fail to explain how the plaintiffs in this case are benefitted by their attorneys receiving $400,000 in profit on expenses incurred specifically in this litigation. Admittedly, the more money lawyers make in civil rights cases, the more civil rights cases that will be litigated. Plaintiffs' arguments, however, would justify separate billing for secretarial time, messenger service, electricity, telephone, paper clips—separate billing at a rate four or five times the actual cost of the expense.

Plaintiffs also take a very cynical view of attorneys by claiming attorneys will start doing paralegal work. There is nothing in the record, however, to suggest that result. In this case, plaintiffs' attorneys entered this case at a time when separate billing for paralegal services was not a widespread practice. Plaintiffs do not suggest that their attorneys would never have taken this case had they known they could not make a $400,000 profit on paralegals hired specifically for this case.

More importantly, as the *amicus* adequately explain, courts now have the discretion and would continue to exercise that discretion to ensure that attorneys are not performing services that could otherwise be performed by a non-attorney. See *Amicus* Br. pp. 18-20. This is sufficient to deter attorneys from receiving attorney rates for paralegal services.

Plaintiffs also dispute the State's argument that reimbursement of actual cost would avoid unnecessary litigation. Resp. Br. 34. This case, however, is a perfect example of the State's position. This Court has cautioned that fee litigation should not result in a second major lawsuit. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Rather than engage in a minute examination of the por-

tion of office overhead and benefits attributable to paralegal employees, the State was willing to just assume a percentage that clearly covered any such overhead. Thus, the State suggested that reimbursement at $15 per hour would more than cover the actual expense of paralegal employees. Plaintiffs do not dispute this. This is more than twice the hourly wage paid to most of the paralegals. Pet. Br. 6.

The State does not dispute that reasonable policy arguments could be made on both sides of this issue. This Court, however, need not decide an ironclad rule that applies to all civil rights cases or fee-shifting statutes. Under the particular facts of this case, the cost-based approach suggested by the State is reasonable and fully consistent with § 1988.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
TERRY ALLEN
Deputy Attorney General
Supreme Court Building
Jefferson City, Missouri 65102
(314) 751-3321

MICHAEL L. BOICOURT
Assistant Attorney General
BRUCE FARMER
BART A. MATANIC
Assistant Attorneys General
Counsel for Petitioners

Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-64

In The

Supreme Court of the United States

October Term, 1988

STATE OF MISSOURI, et al.,

Petitioners,

vs.

KALIMA JENKINS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

JOHN A. DEVAULT, III
Counsel of Record
JANE A. LESTER
Counsel
BEDELL, DITTMAR, DEVAULT & PILLANS, P.A.
The Bedell Building
101 East Adams Street
Jacksonville, FL 32202
(904) 353-0211

For *Amicus Curiae*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

STATEMENT 1

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

The Work of Legal Assistants is Compensable at the Market Rate as Part of A Reasonable Attorney's Fee Award Pursuant to 42 U.S.C. § 1988..... 5

A. Compensating prevailing parties for the work performed by legal assistants on an hourly basis at the market rate comports with accepted practice in the private marketplace and is thus consistent with the purpose of 42 U.S.C. § 1988... 5

B. Compensating for the work of legal assistant time on an hourly basis at the market rate promotes the cost-effective delivery of legal services and enhances the quality of legal services..... 10

C. The inclusion of compensation for legal assistants in an attorney's fee award does not offend ethical and legal tenets prohibiting the unauthorized practice of law..... 14

D. Courts scrutinize attorney's fee applications to assure the hourly rates of legal assistants and the time spent and nature of the work performed by legal assistants are all reasonable..... 18

E. Permitting recovery for work of legal assistants promotes the availability of legal representation to victims of civil rights violations..... 20

CONCLUSION 22

APPENDIX 1A

TABLE OF AUTHORITIES

Pages

CASES

Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir.1986) 13

Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir.Unit B 1982) 9, 18

Alter Financial Corp. v. Citizens & Southern International Bank of New Orleans, 817 F.2d 349 (5th Cir.1987) 9

Bagel Inn, Inc. v. All Star Dairies, 539 F.Supp.107 (D.N.J.1982) 17

Beamon v. City of Ridgeland, Mississippi, 666 F.Supp.937 (S.D.Miss.1987) 11, 17, 19

Blanchard v. Bergeron, 831 F.2d 563 (5th Cir.1987), *cert. granted*, 108 S.Ct.2869 (June 27, 1988) (No. 87-1485) 1

Blum v. Stenson, 465 U.S.886 (1984) 6

Brewer v. Southern Union Co., 607 F.Supp.1511 (D.Colo.1984) 11

Brinker v. Guiffrida, 798 F.2d 661 (3d Cir.1986) 8

Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836 (7th Cir.1984), *cert. denied*, 469 U.S.1106 (1985) 8, 10

Campaign for a Progressive Bronx v. Black, 631 F.Supp.975 (S.D.N.Y.1986) 13

Chandler v. Secretary of Dept. of Health & Human Services, 792 F.2d 70 (6th Cir.1986) 9

Chapman v. Pacific Telephone & Telegraph Co., 456 F.Supp.77 (N.D.Cal.1978) 10, 11, 12

Citizen's Council of Delaware County v. Brinegar, 741 F.2d 584 (3d Cir.1984) 8, 12

TABLE OF AUTHORITIES–Continued

Pages

City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir.1974) 8, 13

City of Riverside v. Rivera, 477 U.S.561 (1986) ... 6, 7, 12, 14

Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc., 835 F.2d 541 (5th Cir.1987) 9

Daggett v. Kimmelman, 811 F.2d 793 (3d Cir.1987) . 8, 19

Drez v. E. R. Squibb & Sons, Inc., 674 F.Supp.1432 (D.Kan.1987) 19

Easter House v. State of Illinois, Dept. of Children and Family Services, 663 F.Supp.456 (N.D.Ill.1987) 17

Edmonds v. United States, 658 F.Supp.1126 (D.S.C.1987) 17

Evans v. Jeff D., 475 U.S.717 (1986) 5, 6

Furtado v. Bishop, 635 F.2d 915 (1st Cir.1980) 8

Garmong v. Montgomery County, 668 F.Supp.1000 (S.D.Tex.1987) 11, 17

Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir.1983) 9

Heath v. Brown, 807 F.2d 1229 (5th Cir.1987) 8, 12

Hensley v. Eckerhart, 461 U.S.424 (1983) 18

Illinois Migrant Council v. Pilliod, 672 F.Supp.1072 (N.D.Ill.1987) 13

In re "Agent Orange" Product Liability Litigation, 818 F.2d 226 (2d Cir.), *cert. denied*, 108 S.Ct.289 (1987) 8, 12, 13

TABLE OF AUTHORITIES–Continued

Pages

In re Burlington Northern, Inc. Employment Practices Litig., 810 F.2d 601 (7th Cir.1986), *cert. denied*, 108 S.Ct.82 (1987) 9, 11, 12

In re Chicken Antitrust Litigation, 560 F.Supp.963 (N.D.Ga.1980) 7, 17

In re Gas Meters Antitrust Litigation, 500 F. Supp.956 (E.D.Pa.1980) 17

Jacobs v. Mancuso, 825 F.2d 559 (1st Cir.1987) .. 8, 10, 12

Jenkins v. Missouri, 838 F.2d 260 (8th Cir.), *cert. granted in part*, 109 S.Ct.218 (Oct. 11, 1988) (No. 88-64), and *cert. denied*, 109 S.Ct.221 (1988) 8

Johnson v. Avery, 393 U.S.483 (1969) 14

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974) 19

Keith v. Volpe, 833 F.2d 850 (9th Cir.1987) 8

Kopunec v. Nelson, 801 F.2d 1226 (10th Cir.1986) .. 9, 12

Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir.1983), *cert. denied*, 466 U.S.951 (1984) 8

Louisville Black Police Officers Organization, Inc. v. City of Louisville, 700 F.2d 268 (6th Cir.1983) 13

Lucero v. City of Trinidad, 815 F.2d 1384 (10th Cir.1987) 8, 12

Metro Data Systems, Inc. v. Durango Systems, Inc., 597 F.Supp.244 (D.Ariz.1984) 20

Morgan v. Nevada Board of State Prison Commissioners, 615 F.Supp.882 (D.Nev.1985) 17

TABLE OF AUTHORITIES–Continued

Pages

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir.1979), *cert. denied*, 447 U.S.911 (1980) 8, 13, 19

PPG Industries, Inc. v. Celanese Polymer Specialities Co., 658 F.Supp.555 (W.D.Ky.1987), *rev'd on other grounds*, 840 F.2d 1565 (Fed.Cir.1988) 13

Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir.1975), *cert. denied*, 425 U.S.959 (1976) 9

Parise v. Riccelli Haulers, Inc., 672 F.Supp.72 (N.D.N.Y.1987) 7, 17

Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 478 U.S.546 (1986) ("*Pennsylvania I*") 5, 18, 19

Pennsylvania v. Delaware Valley Citizen's Council for Clean Air, 107 S.Ct.3078 (1987) ("*Pennsylvania II*") 5, 6

Procunier v. Martinez, 416 U.S.396 (1974) 14

Ramos v. Lamm, 713 F.2d 546 (10th Cir.1983) 7, 8, 18

Richardson v. Byrd, 709 F.2d 1016 (5th Cir.), *cert. denied*, 464 U.S.1009 (1983) 9, 13, 17, 18

Roe v. City of Chicago, 586 F.Supp.513 (N.D.Ill.1984) 13

Royal Crown Cola Co. v. Coca-Cola Co., 678 F.Supp.875 (M.D.Ga.1987) 10

Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C.Cir.1987) 9, 12

Schwartz v. Novo Industri A/S, 119 F.R.D.359 (S.D.N.Y.1988) 11

TABLE OF AUTHORITIES–Continued

Pages

Shorter v. Valley Bank & Trust Co., 678 F.Supp.714 (N.D.Ill.1988) 10

Skelton v. General Motors Corp., 661 F.Supp.1368 (N.D.Ill.1987) 20

Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir.1982), *aff'd*, 465 U.S.752 (1984) 9, 17

Stewart v. Rhodes, 656 F.2d 1216 (6th Cir.1981), *cert. denied*, 455 U.S.991 (1982) 8, 13

Strama v. Peterson, 689 F.2d 661 (7th Cir.1982) 13

The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla.1978) 16

Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240 (9th Cir.1982) 9, 13

Todd Shipyards Corp. v. Director, Office of Workers' Compensation, 545 F.2d 1176 (9th Cir.1976) .. 9, 10, 11, 13

Toussaint v. McCarthy, 826 F.2d 901 (9th Cir.1987) . 8, 12

United Nuclear Corp. v. Cannon, 564 F.Supp.581 (D.R.I.1983) 7

Ursic v. Bethlehem Mines, 719 F.2d 670 (3rd Cir.1983) 19

Ustrak v. Fairman, 851 F.2d 983 (7th Cir.1988) 8, 12

Vaughns v. Board of Education of Prince George's County, 770 F.2d 1244 (4th Cir.1985) 8

Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir.1986) 8

Wilkett v. Interstate Commerce Commission, 844 F.2d 867 (D.C.Cir.1988) 9

TABLE OF AUTHORITIES–Continued

Pages

Williams v. Bowen, 684 F.Supp.1305 (E.D.Pa.1988) 11

Yohay v. City of Alexandria Employees Credit Union, 827 F.2d 967 (4th Cir.1987) 8

Yaris v. Special School Dist. of St. Louis County, 661 F.Supp.996 (E.D.Mo.1987) 13

STATUTE

Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 ..... *passim*

OTHER AUTHORITIES

ABA Model Code of Professional Responsibility (1976)

EC 2-18 15

EC 3-5 16

EC 3-6 15

EC 3-8 15

DR 2-106(A)(B) 15

DR 3-102 15

ABA Model Rules of Professional Conduct (1984)

Rule 1.5(a) 15

Rule 5.3 15

ABA Standing Committee on Legal Assistants, Position Paper on the Question of Licensure or Certification (1986) 15

TABLE OF AUTHORITIES–Continued

Pages

National Association of Legal Assistants, Inc., Code of Ethics and Professional Responsibility (1975, as amended through 1988) 16

National Association of Legal Assistants, Inc., Model Standards and Guidelines for Utilization of Legal Assistants (1984)..... 1, 16

National Association of Legal Assistants, Inc., 1988 National Utilization and Compensation Survey Report (1989) 11

United States Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Quarterly (Spring 1986)..... 2

STATEMENT

The National Association of Legal Assistants, Inc. submits this brief *amicus curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of respondents[1]. This brief is submitted upon the written consent of petitioners and respondents.[2]

INTEREST OF THE AMICUS CURIAE

Legal assistants[3] are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

National Association of Legal Assistants, Inc., Model Standards and Guidelines for Utilization of Legal Assistants (1984).

---

[1] The National Association of Legal Assistants, Inc., submitted this brief, in substantially the same form, as *amicus curiae* in support of petitioner, in the case *Blanchard v. Bergeron*, 831 F.2d 563 (5th Cir.1987), *cert. granted*, 108 S.Ct.2869 (June 27, 1988)(No. 87-1485), currently pending before the Court.

[2] The original of petitioners' written consent by Bruce Farmer, Esquire, counsel for petitioners, and the original of respondents' written consent by Jay Topkis, Esquire, counsel for respondents, are being filed with the Clerk of the Court under separate cover.

[3] The term "legal assistant" is preferred, as it represents those persons doing work of a legal nature under the direct supervision of an attorney, as opposed to a broader category of persons termed "paralegal," who perform work of a similar nature but not necessarily under the supervision of an attorney.

The National Association of Legal Assistants, Inc. ("NALA") was incorporated in 1975 as a non-profit organization, in recognition of and response to the burgeoning use of legal assistants in the delivery of legal services throughout the United States. Representing some 8,000 legal assistants through individual membership or affiliated associations, NALA seeks to promote professional development and continuing education for legal assistants, and to provide a strong national voice to represent this growing and significant profession.[4]

Consistent with these goals, NALA, in 1975, adopted a Code of Ethics and Professional Responsibility for legal assistants to serve as a guideline for the proper conduct by legal assistants in the performance of their duties (reprinted in full in the Appendix to this brief). In 1976, NALA administered the first national legal assistant certification examination, testing skills basic to the profession as well as substantive knowledge of law and procedure. Currently, the voluntary two-day examination program is administered three times yearly. As of July, 1988, 2,327 participants have earned the title CLA (Certified Legal Assistant).

In 1984, NALA adopted its Model Standards and Guidelines for Utilization of Legal Assistants to serve as

---

[4] Projections by the United States Department of Labor indicate an increase in the number of legal assistants from an estimated 53,000 in 1984 to 104,000 in 1995. United States Dept. of Labor, Bureau of Labor Statistics, Occupational Outlook Quarterly (Spring 1986).

a guide for legal assistants and supervising attorneys, by describing the role of a legal assistant in the delivery of legal services. Finally, NALA works hand in hand with local, state and national bar associations to set standards for legal assistants, and provides continuing education for legal assistants through seminars, workshops, publications and video tapes.

The legal assistant is a recognized and desirable addition to the modern law office. The delegation of work, which would otherwise be performed by an attorney, to a skilled legal assistant reduces the cost of legal services to the client and increases attorney efficiency and productivity. The benefits of this cost-reducing, cost-effective delivery of legal services to the public through the attorney-supervised use of legal assistants will be promoted and encouraged if the work of legal assistants is recognized and compensated at the market rate as part of court-awarded attorney's fees.

Were the Court to reverse the ruling below by holding that the time spent by legal assistants in the successful prosecution of a civil rights case should not be compensated at the market rate, under 42 U.S.C. § 1988, the detrimental effect upon those seeking legal representation to redress civil rights violations, as well as in other types of cases in which Congress has provided for the recovery of attorney's fees, would be substantial. Such a result would either discourage attorneys from representing victims of civil rights violations, because they could not receive full compensation for their effort, or force attorneys to perform all tasks of a legal nature, thereby decreasing the utilization of legal assistants and increasing the cost of litigation.

SUMMARY OF ARGUMENT

The widespread use of legal assistants by attorneys to perform work of a legal nature which would otherwise have to be performed by an attorney at a much higher rate has significantly reduced the cost of legal services to the public and enhanced the quality of legal representation by promoting efficient utilization of attorney time. Compensation for the attorney-supervised work of legal assistants at an hourly rate less than that charged by attorneys, but high enough to cover the cost of overhead associated with the work of a legal assistant, is customarily included in attorney's fees charged private fee-paying clients.

A reasonable attorney's fee awarded pursuant to the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, should include market rate compensation for productive work of a legal nature performed by a skilled legal assistant, under the supervision of an attorney, in order to effectuate the purpose of section 1988. Section 1988 was adopted by Congress to make available legal representation to victims of civil rights violations by fully compensating counsel for prevailing parties at a rate competitive with that charged in the private marketplace. An attorney's fee award which includes market rate compensation for the work of legal assistants is competitive with fees charged to traditional fee-paying clients, makes civil rights representation financially feasible for competent attorneys, promotes the cost-effective practice of utilizing legal assistants in the delivery of legal services and is in accord with the goal of making available efficient

and reasonably priced legal services, not only to victims of civil rights violations but also to the public at large.

ARGUMENT

THE WORK OF LEGAL ASSISTANTS IS COMPENSABLE AT THE MARKET RATE AS PART OF A REASONABLE ATTORNEY'S FEE AWARD PURSUANT TO 42 U.S.C. § 1988.

A. Compensating prevailing parties for the work performed by legal assistants on an hourly basis at the market rate comports with accepted practice in the private marketplace and is thus consistent with the purpose of 42 U.S.C. § 1988.

The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." On several occasions, the Court has visited the legislative history of section 1988, finding that the purpose of the Fees Act was to provide a remedy necessary to obtain compliance with civil rights laws, and to promote respect for civil rights through effective citizen enforcement thereof. *Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air*, 478 U.S.546, ___, 106 S.Ct.3088, 3096 (1986) (*"Pennsylvania I"*); *Evans v. Jeff D.*, 475 U.S.717, ___, 106 S.Ct.1531, 1539 (1986). Unless the attorney's fee reimbursement pursuant to section 1988 is *" 'full and complete'*, the statutory rights [created by civil rights legislation] would be meaningless because they would remain largely unenforced." *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air,*

107 S.Ct.3078, 3093 (1987) (Blackmun J., dissenting) (emphasis added) (*"Pennsylvania II"*).

Because most victims of civil rights violations are unable to afford legal representation, Congress found that the market itself would not provide adequate and effective access to the judicial process for vindication of rights violated. *Pennsylvania II*, 107 S.Ct. at 3092 (Blackmun J., dissenting); *City of Riverside v. Rivera*, 477 U.S.561, ___, 106 S.Ct.2686, 2695 (1986). Thus, to ensure that experienced competent attorneys would be willing to represent persons with legitimate civil rights grievances, Congress determined that it would be necessary to compensate lawyers for all time reasonably expended on a case, at a rate mirroring the prevailing market rate in the relevant community. *Pennsylvania II*, 107 S.Ct. at 3095-96; *City of Riverside*, 477 U.S. at ___, 106 S.Ct. at 2696; *Evans*, 475 U.S. at ___, 106 S.Ct. at 1539; *Blum v. Stenson*, 465 U.S.886, 895 (1984). Reasonable section 1988 attorney's fees must be competitive with the private market for lawyers' services, *Pennsylvania II*, 107 S.Ct. at 3092, 3093, 3095 (Blackmun J., dissenting), and "similar to what 'is traditional with attorneys compensated by a fee-paying client.'" *Id.* at 3093 (citation omitted). *See also City of Riverside*, 477 U.S. at ___, 106 S.Ct. at 2695.

Attorneys in the private marketplace traditionally charge fee-paying clients for supervised work of a legal nature performed by legal assistants at a lesser hourly rate than that charged by attorneys. Separate billing for the services of such non-legal personnel as legal assistants and law students is an "increasingly widespread custom." *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir.1983).

> In the not so distant past the court would have frowned upon the practice of billing paraprofessional time separate from attorney time just as it might if a firm separately recorded and billed the hours spent by a secretary on a specific client . . . , but the standing of paraprofessionals has improved significantly as special training has enabled them to undertake a wide variety of more sophisticated tasks previously assigned exclusively to higher priced lawyers. The advent and widespread use of the paraprofessional has meant that the cost of effective legal counsel has been reduced and its availability enhanced without impairing the quality or delivery of legal services.

In re Chicken Antitrust Litigation, 560 F.Supp.963, 977-78 (N.D.Ga.1980) (citation omitted). *See also Parise v. Riccelli Haulers, Inc.*, 672 F.Supp.72 (N.D.N.Y.1987). That attorney's fees include compensation for time spent by legal assistants reflects "the realities of the marketplace and of modern, progressive law office management." *United Nuclear Corp. v. Cannon*, 564 F.Supp.581, 589 (D.R.I.1983).

This court implicitly recognized and encouraged the traditional marketplace use of non-lawyer personnel in the delivery of legal services by approving an award of attorney's fees, pursuant to section 1988, which included compensation for time spent by a law clerk. *City of Riverside*, 477 U.S. at ___, 106 S.Ct. at 2690. Every federal circuit has likewise acknowledged the validity of delegating work of a legal nature to non-lawyer personnel under the supervision of an attorney by compensating for the

work of legal assistants or law clerks pursuant to section 1988,[5] or to an analogous fee-shifting statute or rule.[6]

---

[5] First Circuit: *Jacobs v. Mancuso*, 825 F.2d 559, 563 (1st Cir.1987); *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir.1980); Third Circuit: *Daggett v. Kimmelman*, 811 F.2d 793, 799 (3d Cir.1987) (fee reductions would be approved for work which should have been performed by paralegals); Fourth Circuit: *Vaughns v. Board of Educ. of Prince George's County*, 770 F.2d 1244, 1245-46 (4th Cir.1985); Fifth Circuit: *Heath v. Brown*, 807 F.2d 1229, 1232 (5th Cir.1987); Sixth Circuit: *Stewart v. Rhodes*, 656 F.2d 1216, 1217 (6th Cir.1981), *cert. denied*, 455 U.S.991 (1982); *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir.1979), *cert. denied*, 447 U.S.911 (1980); Seventh Circuit: *Ustrak v. Fairman*, 851 F.2d 983 (7th Cir.1988); *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir.1984), *cert. denied*, 469 U.S.1106 (1985); Eighth Circuit: *Jenkins v. Missouri*, 838 F.2d 260, 266 (8th Cir.), *cert. granted in part*, 109 S.Ct.218 (Oct. 11, 1988)(No. 88-64), and *cert. denied*, 109 S.Ct.218 (1988); Ninth Circuit: *Keith v. Volpe*, 833 F.2d 850, 859 (9th Cir.1987); *Toussaint v. McCarthy*, 826 F.2d 901, 904 (9th Cir.1987); Tenth Circuit: *Lucero v. City of Trinidad*, 815 F.2d 1384, 1385 (10th Cir.1987); *Ramos v. Lamm*, 713 F.2d 546, 558 (10th Cir.1983); Eleventh Circuit: *Walters v. City of Atlanta*, 803 F.2d 1135, 1151 (11th Cir.1986)

[6] Second Circuit: *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 238 (2d Cir.), *cert. denied*, 108 S.Ct.289 (1987) (class action); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir.1974) (anti-trust class action); Third Circuit: *Brinker v. Guiffrida*, 798 F.2d 661, 668 (3d Cir.1986) (recovery for law clerk under Equal Access to Justice Act); *Citizen's Council of Del. County v. Brinegar*, 741 F.2d 584, 596 (3d Cir.1984) (Equal Access to Justice Act); Fourth Circuit: *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967, 974 (4th Cir.1987) (law clerk under Fair Credit Reporting Act, 15 U.S.C. § 1681); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 339-40 n.28 (4th

(Continued on following page)

(Continued from previous page)

Cir.1983), *cert. denied*, 466 U.S.951 (1984) (employment discrimination); Fifth Circuit: *Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc.*, 835 F.2d 541, 546 (5th Cir.1987); *Alter Fin. Corp. v. Citizens & Southern Int'l Bank of New Orleans*, 817 F.2d 349, 350 (5th Cir.1987) (sanctions, 28 U.S.C. § 1927); *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S.1009 (1983) (Title VII sex discrimination class action); Sixth Circuit: *Chandler v. Secretary of Dept. of Health & Human Services*, 792 F.2d 70, 73 (6th Cir.1986) (Social Security Act, 42 U.S.C. § 406); Seventh Circuit: *In re Burlington Northern, Inc. Employment Practices Litig.*, 810 F.2d 601, 609 (7th Cir.1986), *cert. denied*, 108 S.Ct.82 (1987) (employment discrimination action, 42 U.S.C. § 2000e); *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1249-50 (7th Cir.1982), *aff'd*, 465 U.S.752 (1984) (anti-trust, 15 U.S.C. § 1 *et seq.*); Eighth Circuit: *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 817 (8th Cir.1983) (employment discrimination, 42 U.S.C. § 2000e); Ninth Circuit: *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir.1982) (employment discrimination, 42 U.S.C. § 2000e); *Todd Shipyards Corp. v. Director, Office of Workers' Compensation*, 545 F.2d 1176, 1182 (9th Cir.1976) (Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 n.19 (9th Cir.1975), *cert. denied*, 425 U.S.959 (1976) (anti-trust, 15 U.S.C. § 1 *et seq.*); Tenth Circuit: *Kopunec v. Nelson*, 801 F.2d 1226, 1229 (10th Cir.1986) (Equal Access to Justice Act); Eleventh Circuit: *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982) (employment discrimination, 42 U.S.C. § 2000e); D.C. Circuit: *Wilkett v. Interstate Commerce Comm'n*, 844 F.2d 867, 877 (D.C.Cir.1988) (law clerk; Equal Access to Justice Act); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 n.7 (D.C.Cir.1987) *(en banc)* (Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201).

B. Compensating for the work of legal assistant time on an hourly basis at the market rate promotes the cost-effective delivery of legal services and enhances the quality of legal services.

Compensating for the work of legal assistant time as attorney's fees under Section 1988 "encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes." *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir.1984), *cert. denied*, 469 U.S.1106 (1985). Skilled legal assistants are capable of performing some work of a legal nature which would otherwise have to be done by an attorney. To the extent that such work is done by supervised legal assistants at substantially less cost per hour than would have been the case had the work been done by attorneys, the overall cost of legal services to the public is reduced. A rule prohibiting recovery for legal assistant time at the market rate would discourage the cost-effective delivery of legal services.[7]

In addition to reducing the cost of litigation, the use of legal assistants enhances the quality of legal representation. Legal assistants enable the attorney to spend his or her more costly time for greater productivity in more important areas where judgment and decision-making

---

[7] *See, e.g., Jacobs*, 825 F.2d at 563 Spray-Rite Serv. Corp., 684 F.2d at 1250; *Todd Shipyards Corp.*, 545 F.2d at 1182; *Shorter v. Valley Bank & Trust Co.*, 678 F.Supp.714, 724 (N.D.Ill.1988); *Royal Crown Cola Co. v. Coca-Cola Co.*, 678 F.Supp.875, 880 (M.D.Ga.1987); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp.77, 83 (N.D.Cal.1978).

are required. The availability of legal assistants also promotes more thorough trial preparation by permitting a more efficient and economical utilization of staff time. *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp.77, 83 (N.D. Cal.1978). *See also Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1176, 1182 (9th Cir.1976); *Beamon v. City of Ridgeland, Miss.*, 666 F.Supp. 937, 946 (S.D.Miss.1987).

Law firms in the private marketplace routinely include an hourly rate charge for legal assistants as part of the attorney's fee charged fee-paying clients. Indeed, seventy-seven percent of 1,800 legal assistants responding to a recent survey indicated that their law firm received compensation for their work from clients on an hourly billing rate basis. National Association of Legal Assistants, Inc., 1988 National Utilization and Compensation Survey Report (1989). "Law firms, like other businesses that sell time, must set their hourly rates at an amount greater than that needed to pay their attorneys' or paralegals' salaries; they must figure into those rates all their costs of doing business." *In re Burlington Northern Inc. Employment Practices Litig.*, 810 F.2d 601, 609 (7th Cir.1986), *cert. denied*, 108 S.Ct.82 (1987). The hourly rate of legal assistants must reflect not only base salary, but also fringe benefits and a proportionate share of firm overhead.[8] Additionally, the routine practice of law

---

[8] *See Schwartz v. Novo Industri A/S*, 119 F.R.D.359, 365 (S.D.N.Y.1988) (citation omitted). *See also Williams v. Bowen*, 684 F.Supp.1305, 1308 (E.D.Pa.1988); *Garmong v. Montgomery County*, 668 F.Supp.1000, 1011 (S.D.Tex.1987); *Brewer v. Southern Union Co.*, 607 F.Supp.1511, 1528 (D.Colo.1984).

firms seeking reimbursement for the work of legal assistants at a rate sufficient to cover both the "actual cost" and overhead costs associated with that legally related work is a fairer billing procedure.

> Unlike the work of secretaries and other supporting personnel, . . . the work of paralegals and law clerks is ordinarily charged directly to particular litigation and is therefore a clearly identifiable cost. Were it to be treated as an overhead expense, payable out of the general receipts of the attorney, the across-the-board cost of services to the attorney's clients generally would be burdened by paralegal costs incurred in connection with particular matters of no interest or benefit to other clients.

Chapman, 456 F.Supp. at 82.

Consistent with the private billing procedure, a majority of federal trial and appellate courts approve compensation of legal assistant work hours, as well as the legally related work of other non-attorneys such as law clerks, based upon a reasonable hourly rate set lower than the hourly rate of attorneys but higher than the "actual cost" and sufficient to defray the cost of overhead. *See Jacobs v. Mancuso*, 825 F.2d 559, 563 n.6 (1st Cir.1987) (legal assistant expenses are most frequently reimbursed based on an hourly fee).[9] This Court, in *City*

---

[9] *See also, e.g., Ustrak*, 851 F.2d 983; *Wilkett*, 844 F.2d at 877; *Save Our Cumberland Mountains, Inc.*, 826 F.2d at 54 n.7; *Toussaint*, 826 F.2d at 904; *Jacobs*, 825 F.2d at 563 & n.6; *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 230, 238; *Lucero*, 815 F.2d at 1386; *In re Burlington Northern, Inc. Employment Practices Litig.*, 810 F.2d at 609; *Heath*, 807 F.2d at 1232; *Kopunec*, 801 F.2d at 1229; *Citizen's Council of Del. County*, 741 F.2d at 596;

(Continued on following page)

of Riverside, supra, approved an attorney's fee award which included compensation for time spent by a student law clerk, at the rate of twenty-five dollars an hour, clearly more than the actual wages paid to the individual, and obviously high enough to cover the overhead costs associated with the non-lawyer employee. *See* 477 U.S. at ___, 106 S.Ct. at 2690 & n.2.[10]

(Continued from previous page)

Richardson, 709 F.2d at 1023; *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 273 (6th Cir.1983); *Strama v. Peterson*, 689 F.2d 661, 663 (7th Cir.1982); *Stewart v. Rhodes*, 656 F.2d at 1216-17; *Todd Shipyards Corp.*, 545 F.2d at 1182.

[10] To highlight the need for this Court's guidance, several courts have allowed the recovery of compensation for the work of legal assistants or law clerks based on an hourly-rate while at the same time calling it compensation for "expenses," rather than attorney's fees. *See In re "Agent Orange" Product Liab. Litig.*, 818 F.2d at 238; *Yaris v. Special School Dist. of St. Louis County*, 661 F.Supp.996, 1002, 1003 n.9 (E.D.Mo.1987); *PPG Industries, Inc. v. Celanese Polymer Specialties Co.*, 658 F.Supp.555, 560, 565 (W.D.Ky.1987), *rev'd on other grounds*, 840 F.2d 1565 (Fed.Cir.1988). Some courts have held that law firms may only recover their paralegal "out of pocket" expenses, *see Thornberry*, 676 F.2d at 1244 (citing *Northcross*, 611 F.2d at 639), while others have permitted reimbursement for salary actually paid to a legal assistant, with no additional compensation for fringe benefits or overhead. *See, e.g., City of Detroit*, 495 F.2d at 473; *Illinois Migrant Council v. Pilliod*, 672 F.Supp.1072, 1084 (N.D.Ill.1987); *Campaign for a Progressive Bronx v. Black*, 631 F.Supp.975, 983 (S.D.N.Y.1986). Still others refuse to provide separate compensation for the work of legal assistants, taking the position that legal assistants represent overhead, such as clerical and office expenses, all covered by the attorney's hourly rate. *See Abrams v. Baylor College of Medicine*, 805 F.2d 528, 535 (5th Cir.1986); *Roe v. City of Chicago*, 586 F.Supp.513, 516 & n.6 (N.D.Ill.1984)

C. The inclusion of compensation for legal assistants in an attorney's fee award does not offend ethical and legal tenets prohibiting the unauthorized practice of law.

Any objection to including compensation for the supervised legally-related work of legal assistants in a reasonable attorney's fee award because legal assistants are not attorneys is but a "technical" one. The work performed by legal assistants is work of the type necessary to the prosecution of the litigation which would otherwise be performed by attorneys. Indeed, this Court has recognized the validity of non-lawyer personnel performing services of a legal nature. In *Procunier v. Martinez*, 416 U.S.396 (1974), the Court affirmed the striking of a prison administrative rule banning attorney-client interviews conducted by law students or legal paraprofessionals as constituting an unjustified restriction on the right of access to the courts. The Court agreed with the trial court's finding that prohibiting the use of law students or other paraprofessionals from conducting attorney-client interviews with prisoners would inhibit adequate professional representation of indigent inmates, or alternately, increase the cost of legal representation for prisoners. *Id.* at 419-20. Likewise, in *Johnson v. Avery*, 393 U.S.483 (1969), the Court struck down a prison regulation prohibiting any inmate from advising or assisting another in the preparation of legal documents. The Court noted that "the type of activity involved here – preparation of petitions for post-conviction relief – though historically and traditionally one which may benefit from the services of a trained and dedicated lawyer, is a function often, perhaps generally, performed by a layman." *Id.* at 490 n.11. *See also City of Riverside*, 477 U.S. at ___, 106 S.Ct. at

2690 (affirming attorney's fee award which included compensation for work performed by a law clerk).

Compensation for lawyer-supervised legally-related work performed by legal assistants conforms with the ethical canons and disciplinary codes governing lawyers and legal assistants. Lawyers are obligated to keep fees in check and take steps to provide efficient, cost-effective legal services. *See* ABA Model Code of Professional Responsibility EC 2-18 and DR 2-106(A)(B) (1976); ABA Model Rules of Professional Conduct, Rule 1.5(a) (1984). The delegation of tasks to lay persons is proper "if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently." Model Code EC 3-6. *See also* Model Rules, Rule 5.3.[11] Because the lawyer, or law firm, is the recipient of an attorney's fee for legal services and not the salaried legal assistant, the inclusion of compensation for the supervised work of a legal assistant as part of a reasonable attorney's fee does not offend ethical rules prohibiting attorneys from sharing legal fees with laymen. *See* Model Code EC 3-8 and DR 3-102.

---

[11] The American Bar Association emphasizes that the work of a legal assistant "involves the performance, under the ultimate direction and supervision of an attorney, of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistance, the attorney would perform the task." ABA Standing Committee on Legal Assistants, Position Paper on the Question of Licensure or Certification (1986)

Legal assistants recognize the ethical ramifications of their performance of legally-related work, and emphasize, in self-policing ethics codes and guidelines, that legal assistants shall not undertake tasks which are required to be performed by an attorney, such as setting fees, giving legal advice, or appearing in any way to a court, the client, or the public to be practicing law.[12] Additionally, the rules stress that all work of a legal nature performed by a legal assistant must be delegated and supervised by an attorney, who retains ultimate responsibility to the client and assumes full professional responsibility for the work product. National Association of Legal Assistants, Inc., Code of Ethics and Professional Responsibility (1975, as amended through 1988); National Association of Legal Assistants Model Standards and Guidelines for Utilization of Legal Assistants (1984) (both reprinted in full in the Appendix to this brief). It is the close supervision by an attorney which keeps the legally-related work of a legal assistant from treading upon the

---

[12] Though the American Bar Association has shied away from defining what constitutes the practice of law, ABA Code of Professional Responsibility, it notes that "[f]unctionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer." ABA Model Code of Professional Responsibility EC 3-5 (1976). Courts faced with the question have attempted to craft a definition. For example, the Florida Supreme Court has stated that the giving of advice and the performance of services which affect important rights of a person under the law, and require legal skill and knowledge of the law greater than that possessed by the average citizen, constitutes the practice of law. *The Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1191 (Fla. 1978).

prohibited and unacceptable unauthorized practice of law, and makes the work of a legal assistant no more than an extension of the work of an attorney at a less costly rate.[13]

---

[13] Courts awarding attorney's fees for the supervised work of legal assistants have delineated examples of legal services which would otherwise be performed by an attorney, and thus which are compensable if performed by a legal assistant. They include: investigation of the facts relating to the action, *In re Gas Meters Antitrust Litig.*, 500 F.Supp.956, 969 (E.D.Pa.1980); assisting with discovery, including such tasks as statistical and financial analysis, inspection and production of documents, review of answers to interrogatories, and the compilation of statistical and financial data, *Bagel Inn, Inc. v. All Star Dairies*, 539 F.Supp.107, 111 (D.N.J.1982); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 967; *see also, e.g., Richardson*, 709 F.2d at 1023; *Spray-Rite Service Corp.*, 684 F.2d at 1250; doing legal research, *Morgan v. Nevada Board of State Prison Comm'rs*, 615 F.Supp.882, 885 (D.Nev.1985); locating and interviewing witnesses, *Richardson*, 709 F.2d at 1023; *Garmong*, 668 F.Supp. at 1011; organizing and communicating with class members, *Richardson, supra; Edmonds v. United States*, 658 F.Supp.1126, 1136 (D.S.C.1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 970; assisting with preparation for deposition and trial, and organizing exhibits, *Easter House v. State of Illinois, Dept. of Children and Family Services*, 663 F.Supp.456, 460 (N.D.Ill.1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 972; assisting with preparation of settlement and settlement administration, *In re Chicken Antitrust Litig.*, 560 F.Supp.963, 978 (N.D.Ga.1980); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 967, 972; compiling statistical and financial data, *Bagel Inn, Inc.*, 539 F.Supp. at 111; drafting pleadings, *Parise v. Riccelli Haulers, Inc.*, 672 F.Supp.72, 75 (N.D.N.Y.1987); *In re Gas Meters Antitrust Litig.*, 500 F.Supp. at 969; and checking legal citations, *Beamon v. City of Ridgeland, Miss.*, 666 F.Supp.937, 943 (S.D.Miss.1987).

D. Courts scrutinize attorney's fee applications to assure the hourly rates of legal assistants and the time spent and nature of the work performed by legal assistants are all reasonable.

Courts compensating for the work performed by a legal assistant in connection with the award of a reasonable attorney's fee scrutinize the reported hours, the suggested rate, and the nature of the work performed in the same manner they scrutinize lawyer time and rates. *See Pennsylvania I*, 478 U.S. at ___, 106 S.Ct. at 3098; *Hensley v. Eckerhart*, 461 U.S.424, 434 (1983); *Ramos*, 713 F.2d at 559. Trial courts determine what portion of the work is of a clerical nature and is thus absorbed as part of the office overhead reflected in the attorney's billing rate and what portion of the work performed by the legal assistant constitutes legal services traditionally done by an attorney and which would otherwise be performed by an attorney at a costlier rate. *Ramos*, 713 F.2d at 558; *Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, 464 U.S.1009 (1983). "Such expenses are separately recoverable only as part of a prevailing party's award for attorney's fees and expenses, and even then only to the extent that the paralegal performs work traditionally done by an attorney. Otherwise, paralegal expenses are separately unrecoverable overhead expenses." *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir.Unit B 1982).

Indeed, when considering a reasonable attorney's fee award, courts have chastised attorneys for doing work which more properly could have been delegated to a legal assistant under the attorney's supervision, and have penalized the attorney by lowering the hourly rate charged.

> It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir.1974). Wasteful utilization of expensive legal talent for work that may be delegated to non-lawyers is not condoned. "Routine tasks, if performed by senior partners in large firms, should not be billed at their usual rates. A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn." *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir.1983). Accordingly, courts regularly reduce an attorney's hourly rate to that traditionally charged for a legal assistant, to reflect the nature of the legal work performed.[14]

---

[14] *See, e.g., Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S.546, ___, ___, 106 S.Ct.3088, 3092, 3099 (1986) (*"Pennsylvania I"*) (approving a lodestar which set different hourly rates for legal work requiring varying degrees of legal ability); *Daggett v. Kimmelman*, 811 F.2d at 799 (attorney hours devoted to tasks which should have been performed by associates or paralegals would warrant an hourly fee reduction); *Northcross*, 611 F.2d at 637, (necessary services performed by attorneys which could have reasonably been performed by less expensive personnel may be compensated at a lower rate than attorney's normal billing rate); *Drez v. E. R. Squibb & Sons, Inc.*, 674 F.Supp.1432 (D.Kan.1987) (dropping attorney billing rate to law clerk rate where three attorneys sat through trial); *Beamon*, 666 F.Supp. at 941-42 (attorney fees for purely clerical

(Continued on following page)

E. Permitting recovery for work of legal assistants promotes the availability of legal representation to victims of civil rights violations.

If the lawyer attempts to absorb the cost of the legal assistant into his or her regular hourly rate as an overhead expense, as is done for clerical work and office supplies, or to absorb the overhead costs associated with the work of a legal assistant, then all persons employing that attorney, including victims of civil rights violations, would suffer a higher hourly rate, regardless of whether their case necessitated the assistance of a legal assistant. More likely, the work currently performed by legal assistants would be done by attorney associates and billed at the higher attorney associate rate, clearly decreasing the utilization of legal assistants and increasing the cost of litigation. The attorney performing legal tasks which could be delegated to a legal assistant, however, faces the risk that his or her fee will be reduced by a court as being unreasonably high for the quality of work performed. The only remaining alternative would be for the attorney

---

(Continued from previous page)

work which is easily delegable granted at reduced hourly rate); *Skelton v. General Motors Corp.*, 661 F.Supp.1368, 1385 (N.D.Ill.1987) (court reduces time of attorney spent on administrative tasks); *Metro Data Systems, Inc. v. Durango Systems, Inc.*, 597 F.Supp.244, 246 (D.Ariz.1984) (gathering information and drafting answers to interrogatories not recoverable by attorney as work which could have been performed by paralegal).

to perform the work at a reduced rate, below and not competitive with the market rate. Such a result would make the representation of victims of civil rights violations cost prohibitive and unattractive, and discourage competent, experienced attorneys from undertaking such representation because they could not receive full compensation for their efforts.

The widespread practice of assigning less technical yet legal work to legal assistants to be performed under the supervision of an attorney promotes economy and efficiency in the administration of justice. Permitting reasonable compensation for such services at the market rate as part of a reasonable attorney's fee encourages this desirable practice, and makes legal representation more readily available to victims of civil rights violations, in accord with Congress' intent when adopting the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988.

CONCLUSION

For the reasons set forth above, the National Association of Legal Assistants, Inc., as *amicus curiae*, respectfully urges the Court to affirm the decision of the Court of Appeals for the Eighth Circuit and permit recovery for the work of legal assistants at the market rate as part of a reasonable attorney's fee award made pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

JOHN A. DEVAULT, III
Counsel of Record
JANE A. LESTER
Counsel
BEDELL, DITTMAR, DEVAULT
& PILLANS, P.A.
The Bedell Building
101 East Adams Street
Jacksonville, FL 32202
(904) 353-0211

For *Amicus Curiae*
National Association of
Legal Assistants, Inc.

APPENDIX

TABLE OF CONTENTS

National Association of Legal Assistants, Inc., Code of Ethics and Professional Responsibility (1975, as amended through 1988) 1A

National Association of Legal Assistants, Inc., Model Standards and Guidelines for Utilization of Legal Assistants (1984)..... 3A

CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY

It is the responsibility of every legal assistant to adhere strictly to the accepted standards of legal ethics and to live by general principles of proper conduct. The performance of the duties of the legal assistant shall be governed by specific canons as defined herein in order that justice will be served and the goals of the profession attained. The canons of ethics set forth hereafter are adopted by the National Association of Legal Assistants, Inc., as a general guide and the enumeration of these rules does not mean there are not others of equal importance although not specifically mentioned.

Canon 1. A legal assistant shall not perform any of the duties that lawyers only may perform nor do things that lawyers themselves may not do.

Canon 2. A legal assistant may perform any task delegated and supervised by a lawyer so long as the lawyer is responsible to the client, maintains a direct relationship with the client, and assumes full professional responsibility for the work product.

Canon 3. A legal assistant shall not engage in the practice of law by accepting cases, setting fees, giving legal advice or appearing in court (unless otherwise authorized by court or agency rules).

Canon 4. A legal assistant shall not act in matters involving professional legal judgment as the services of a lawyer are essential in the public interest whenever the exercise of such judgment is required.

Canon 5. A legal assistant must act prudently in determining the extent to which a client may be assisted without the presence of a lawyer.

Canon 6. A legal assistant shall not engage in the unauthorized practice of law.

Canon 7. A legal assistant must protect the confidence of a client, and it shall be unethical for a legal assistant to violate any statute now in effect or hereafter to be enacted controlling privileged communications.

Canon 8. It is the obligation of the legal assistant to avoid conduct which would cause the lawyer to be unethical or even appear to be unethical and loyalty to the employer is incumbent upon the legal assistant.

Canon 9. A legal assistant shall work continually to maintain integrity and a high degree of competency throughout the legal profession.

Canon 10. A legal assistant shall strive for perfection through education in order to better assist the legal profession in fulfilling its duty of making legal services available to clients and the public.

Canon 11. A legal assistant shall do all things incidental, necessary or expedient for the attainment of the ethics and responsibilities imposed by statute or rule of court.

Canon 12. A legal assistant is governed by the American Bar Association Model Code of Professional Responsibility, and the American Bar Association Model Rules of Professional Conduct.

NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, INC.

MODEL STANDARDS AND GUIDELINES FOR UTILIZATION OF LEGAL ASSISTANTS

@Copyright National Association of Legal Assistants, Inc., 1984

PREAMBLE

Proper utilization of the services of legal assistants affects the efficient delivery of legal services. Legal assistants and the legal profession should be assured that some measures exist for identifying legal assistants and their role in assisting attorneys in the delivery of legal services. Therefore, the National Association of Legal Assistants, Inc., hereby adopts these Model Standards and Guidelines as an educational document for the benefit of legal assistants and the legal profession.

DEFINITION

Legal assistants* are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

---

* Within this occupational category some individuals are known as paralegals.

STANDARDS

A legal assistant should meet certain minimum qualifications. The following standards may be used to determine an individual's qualifications as a legal assistant:

1. Successful completion of the Certified Legal Assistant (CLA) examination of the National Association of Legal Assistants, Inc.; (see attached Exhibit A)

2. Graduation from an ABA approved program of study for legal assistants;

3. Graduation from a course of study for legal assistants which is institutionally accredited but not ABA approved, and which requires not less than the equivalent of 60 semester hours of classroom study;

4. Graduation from a course of study for legal assistants, other than those set forth in (2) and (3) above, plus not less than six months of in-house training as a legal assistant;

5. A baccalaureate degree in any field, plus not less than six months in-house training as a legal assistant;

6. A minimum of three years of law-related experience under the supervision of an attorney, including at least six months of in-house training as a legal assistant; or

7. Two years of in-house training as a legal assistant.

For purposes of these standards, "in-house training as a legal assistant" means attorney education of the employee concerning legal assistant duties and these guidelines. In addition to review and analysis of assignments, the legal assistant should receive a reasonable

amount of instruction directly related to the duties and obligations of the legal assistant.

GUIDELINES

These guidelines relating to standards of performance and professional responsibility are intended to aid legal assistants and attorneys. The responsibility rests with an attorney who employs legal assistants to educate them with respect to the duties they are assigned and to supervise the manner in which such duties are accomplished.

Legal assistants should:

1. Disclose their status as legal assistants at the outset of any professional relationships with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public;

2. Preserve the confidences and secrets of all clients; and

3. Understand the attorney's Code of Professional Responsibility and these guidelines in order to avoid any action which would involve the attorney in a violation of that Code, or give the appearance of professional impropriety.

Legal assistants should not:

1. Establish attorney-client relationships; set legal fees; give legal opinions or advice; or represent a client before a court; nor

2. Engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law.

Legal assistants may perform services for an attorney in the representation of a client, provided:

1. The services performed by the legal assistant do not require the exercise of independent professional legal judgment;
2. The attorney maintains a direct relationship with the client and maintains control of all client matters;
3. The attorney supervises the legal assistant;
4. The attorney remains professionally responsible for all work on behalf of the client, including any actions taken or not taken by the legal assistant in connection therewith; and
5. The services performed supplement, merge with and become the attorney's work product.

In the supervision of a legal assistant, consideration should be given to:

1. Designating work assignments that correspond to the legal assistant's abilities, knowledge, training and experience;
2. Educating and training the legal assistant with respect to professional responsibility, local rules and practices, and firm policies;
3. Monitoring the work and professional conduct of the legal assistant to ensure that the work is substantively correct and timely performed;
4. Providing continuing education for the legal assistant in substantive matters through courses, institutes, workshops, seminars and in-house training; and
5. Encouraging and supporting membership and active participation in professional organizations.

Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's Code of Professional Responsibility, and within the preceding parameters and proscriptions, a legal assistant may perform any function delegated by an attorney, including, but not limited to the following:

1. Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the legal assistant, and the client contact is under the supervision of the attorney.
2. Locate and interview witnesses, so long as the witnesses are aware of the status and function of the legal assistant.
3. Conduct investigations and statistical and documentary research for review by the attorney.
4. Conduct legal research for review by the attorney.
5. Draft legal documents for review by the attorney.
6. Draft correspondence and pleadings for review by and signature of the attorney.
7. Summarize depositions, interrogatories, and testimony for review by the attorney.
8. Attend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney.
9. Author and sign letters provided the legal assistant's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.

EXHIBIT A

To become eligible to sit for the Certified Legal Assistant (CLA) examination, candidates must meet one of the following requirements:

1. Graduation from an ABA approved legal assistant training course or graduation from a legal assistant training course at a school which is institutionally accredited;
2. Graduation from a legal assistant course neither approved by the ABA nor at an institutionally accredited school plus two (2) years experience as a legal assistant;
3. A bachelor's degree in any field plus one (1) year experience as a legal assistant;
4. Seven (7) years law related experience under the supervision of a member of the bar (Note: This optional requirement is open through December 31, 1991.).

Once admitted to the program, the applicant must successfully complete an eleven hour examination covering general skills required of all legal assistants plus knowledge of four substantive areas of the law.

The CLA designation is for a period of five years and if the CLA submits proof of continuing education in accordance with the stated requirements, the certificate is renewed for another five years. Lifetime certification is not permitted.

CLA is a service mark duly registered with the U.S. Patent and Trademark Office (No. 1131999). Any unauthorized use is strictly forbidden.

. . . . . .